Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

NEW YORK CITY, MARVA LIVINGSTON HAMMONS, as Commissioner of Social Services of the City of New York, and CLAUDE MEYERS, as Deputy Commissioner of Social Services of the City of New York,

Petitioners,

-against-

MARC TENENBAUM and MARY TENENBAUM, individually and on behalf of SARAH TENENBAUM, an infant,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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February 18, 2000

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QUESTIONS PRESENTED

(1) Did the Court of Appeals improperly redefine what constitutes an "emergency" removal of a child suspected of being the victim of parental abuse by adding an unprecedented requirement that there be insufficient time to obtain prior court authorization?

(2) Did the Court of Appeals improperly fail to recognize that an immediate medical examination is properly conducted when it is objectively medically indicated, as it was here, irrespective of whether it was also ordered for the forensic purpose of attempting to substantiate an allegation of abuse?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, were as follows: Marc Tenenbaum and Mary Tenenbaum, both individually and on behalf of Sarah Tenenbaum, an infant, were plaintiffs-appellees-cross-appellants; Nat Williams, individually and as a caseworker for the Child Welfare Administration, Veronica James, individually and as a caseworker for the Child Welfare Administration, Doby Flowers, individually and as Commissioner of Social Services of the City of New York, and Brooke Trent, individually and as Deputy Commissioner of Social Services of the City of New York, were defendants-cross-appellees; New York City was defendant-appellant-cross-appellee; and Marva Livingston Hammons, as Commissioner of Social Services of the City of New York, and Claude Meyers, as Deputy Commissioner of Social Services of the City of New York, were appellants-cross-appellees.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 19

I. **CERTIORARI SHOULD BE GRANTED, BECAUSE THE SECOND CIRCUIT IMPROPERLY REDEFINED "EMERGENCY" AND IMPOSED A NEW STANDARD TO THE DETERMINATION OF WHAT CONSTITUTES AN EMERGENCY REMOVAL AND, THEREFORE, IS PERMITTED ABSENT A COURT ORDER** 20

TABLE OF CONTENTS (continued)

Page

II. DEFENDANTS' DECISION TO HAVE SARAH PHYSICALLY EXAMINED IMMEDIATELY UPON HER ARRIVAL AT CONEY ISLAND HOSPITAL WAS JUSTIFIED AS NECESSARY TO DIAGNOSE HER CONDITION AND TO DETERMINE WHETHER SHE WAS IN NEED OF IMMEDIATE MEDICAL TREATMENT. 24

CONCLUSION 31

APPENDIX

Court of Appeals Opinion A1

District Court Opinion A57

District Court Order Denying Reconsideration A99

Court of Appeals Order Denying Rehearing A126

TABLE OF AUTHORITIES

Cases **Page**

Chayo v. Kaladjian,
844 F. Supp. 163 (S.D.N.Y. 1994) 26, 29

Darryl H. v. Coler,
801 F.2d 893 (7th Cir. 1986) 27

DeShaney v. Winnebago County Dep't of Social Servs.,
489 U.S. 189 (1989) 27

Duchesne v. Sugarman,
566 F.2d 817 (2d Cir. 1977) 20

Joyner v. Dumpson,
712 F.2d 770 (2d Cir.) 20

Lossman v. Pekarske,
707 F.2d 288 (7th Cir. 1983) 20

Marisol A. v. Giuliani,
929 F. Supp. 662 (S.D.N.Y. 1996) 27

Myers v. Morris,
810 F.2d 1437 (8th Cir. 1987) 20

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 26

Ram v. Rubin,
118 F.3d 1306 (9th Cir. 1997) 20

Cases (continued) **Page**

Robison v. Via,
821 F.2d 913 (2d Cir. 1987) 20, 22, 23

Schwimmer v. Kaladjian,
988 F. Supp. 631 (S.D.N.Y. 1997)
aff'd, 164 F.3d 619 (2d Cir. 1998) 29

van Emrik v. Chemung County Dep't of
Social Servs.,
911 F.2d 863 (2d Cir. 1990) ..... *passim*

Statutory and Constitutional Provisions

U.S. Const. amend. IX ..... *passim*

U.S. Const. amend. XIV ..... *passim*

28 U.S.C. § 1254 2

28 U.S.C. § 1331 9

28 U.S.C. §1343 9

42 U.S.C. § 671(a) 13

42 U.S.C. §1983 ..... *passim*

N.Y. Family Court Act § 1024 ..... 3, 8, 9

N.Y. Social Servs. Law § 383-b 4, 27

N.Y. Social Servs. Law § 417 ..... 4, 8, 9

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Petition For Writ of Certiorari to the United States Court of Appeals For the Second Circuit

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Second Circuit, from which petitioners seek certiorari, was entered October 13, 1999. The opinion of the Second Circuit and the dissent therefrom were entered on October 13, 1999. They appear at 193 F.3d 581 and appear in the appendix at A1-56. The Second Circuit's denial of the petition for rehearing was entered December 27, 1999. That order is not reported. It appears in the appendix at

A123. The September 30, 1994 memorandum and order of the U.S. District Court for the Eastern District of New York is reported at 862 F. Supp. 962 and appears in the appendix at A57-96. The District Court's November 20, 1995 decision denying reconsideration appears at 907 F. Supp. 606 and appears in the appendix at A97-122.

JURISDICTION

The Second Circuit issued its judgment on October 13, 1999. The Second Circuit issued an order denying rehearing on December 27, 1999 (A123). This Court has jurisdiction to review this judgment under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV to the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV to the United States Constitution states as follows:

> Section I . . . No State shall deprive any person of life, liberty, or property, without due process of law . . . .

At the time of the actions at issue herein, 42 United States Code § 1983 stated as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(amended 1996).

At the time of the actions at issue herein, New York Family Court Act § 1024, entitled Emergency removal without court order, provided, in pertinent part, as follows:

> (a) . . .a designated employee of a city . . . department of social services shall take all necessary measures to protect a child's life or health including, when appropriate, taking or keeping a child in protective custody . . . without an order under section one thousand twenty-two and without the consent of the parent or other person legally responsible for the child's care, regardless of whether the parent or other person legally responsible for the child's care is absent, if (i) such person has reasonable cause to believe that the child is in such circumstance or condition that his continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and

(ii) there is not time enough to apply for an order under section one thousand twenty-two.

(amended 1990).

New York Social Services Law § 383-b, entitled Medical treatment for abused or neglected children; consent of commissioners, provides, in pertinent part, as follows:

> The local commissioner of social services or the local commissioner of health may give effective consent for medical, dental, health and hospital services for any child . . . who has been taken into or kept in protective custody or removed from the place where he is residing, or who has been placed in the custody of such commissioner, pursuant to section four hundred seventeen of this chapter or section . . . one thousand twenty-four . . . of the family court act.

At the time of the actions at issue herein, New York Social Services Law § 417, entitled Taking a child into protective custody, provided, in pertinent part, as follows:

> 1. (a) Pursuant to the requirements and provisions of the family court act, . . . a designated employee of a city . . . department of social services shall take all appropriate measures to protect a child's life and health including, when appropriate, taking or keeping a child in protective custody without the consent of a parent or guardian if such person has reasonable cause to believe that the circumstances or condition of the child are such that continuing in his place of residence or in the

> care and custody of the parent, guardian, custodian or other person responsible for the child's care presents an imminent danger to the child's life or health.

(amended 1996).

STATEMENT OF THE CASE

Nature of Case

Marc and Mary Tenenbaum, the parents of Sarah Tenenbaum, brought this civil rights action under 42 U.S.C. § 1983, individually and on behalf of their infant child Sarah, seeking damages for the allegedly unlawful and unconstitutional emergency removal of Sarah from school in January 1990 and the subsequent medical examination of Sarah that was conducted at Coney Island Hospital. These actions were taken during the course of the New York City Child Welfare Administration's ("CWA") investigation into allegations of sexual abuse made against the child's father, plaintiff Marc Tenenbaum. In addition to federal and state claims against individual CWA employees and state claims against the New York City Board of Education ("Board"), plaintiffs alleged municipal policy claims against the City of New York (the "City"), the Commissioner and Deputy Commissioner of Social Services, and the Board.

Statement of Relevant Facts

In September 1989, plaintiffs Marc and Mary Tenenbaum enrolled their daughter Sarah as a kindergarten student at P.S. 230 in Brooklyn where she was assigned to Mary Murphy's class. From the time that Sarah arrived in Mrs. Murphy's class, Sarah frequently fell asleep in class for long periods of time. She was very shy and did not interact with the other children in the class. She would seek out Mrs. Murphy to show her things, but Sarah's

verbalization was limited. On occasion, Sarah would cry in the morning in class. No other students in Mrs. Murphy's class slept in class as much as Sarah did nor was any other student as shy as Sarah was. Moreover, Mrs. Murphy did not have other students who had difficulty in expressing themselves orally to the extent Sarah did. Over the course of the Fall 1989 semester, Sarah attempted to communicate more with Mrs. Murphy and became increasingly comfortable with Mrs. Murphy in class. Sarah would show Mrs. Murphy pictures she had drawn and would speak in one or two word sentences.

Mrs. Murphy's class had a play area or "housekeeping area" which was equipped with pots and pans, toys, books and dolls. These dolls were made of soft plastic, did not have any sex designation, did not have any genitalia and were approximately 14 to 16 inches in length. Some of the dolls were clothed and some were not clothed because the children would sometimes take the clothes off during play.

On January 4 and 5, 1990, Sarah Tenenbaum communicated information to her teacher, Mary Murphy, in words and gestures that led Mrs. Murphy to believe that Sarah's father hurt her in her vaginal area at night. One of the gestures that Sarah made was to point to the groin area of one of the dolls in the play area of her classroom when asked by Mrs. Murphy where Sarah was hurt. Mrs. Murphy advised P.S. 230's guidance counselor, assistant principal, and principal about what Sarah had communicated to her.

Mary Murphy, as a public school teacher, was an official required to report cases of suspected child abuse or maltreatment ("mandated source" or "mandated reporter") to the New York State Department of Social Services' Central Register of Child Abuse and Maltreatment. Alternatively, she may report a case of suspected abuse or

maltreatment to the person in charge of the school who is then responsible for reporting the allegation to the Central Register or causing the allegation to be reported. The Central Register receives reports of suspected child abuse and maltreatment by telephone and facsimile machine twenty-four hours a day, seven days a week. Telephone operators record the allegations of each telephone call and facsimile message on a DSS Form 2221 ("2221 Report"). Each 2221 Report is sent by facsimile machine to the appropriate local child protective agency for investigation.

P.S. 230's guidance counselor, Susan Raiten, called the State Central Register on the morning of Friday, January 5, 1990 and reported what Sarah had communicated to Mrs. Murphy. This information was recorded on a 2221 Report and faxed to the CWA Brooklyn Field Office. In the portion of the 2221 Report that states the reasons for suspicion of child abuse, it is written: "Sarah is speech and language delayed. Sarah unable to stay awake during the day. Ch [Child] often naps off and on all day. Ch [Child] is nervous and withdrawn. Ch [Child] is afraid of fa [father]. Fa [Father] hurts her vaginal area at night."

After initial processing, the allegations contained in the 2221 Report were assigned to the child protective unit in CWA's Brooklyn field office, which was supervised by Nat Williams, a "Supervisor II." After reviewing the allegations contained in the 2221 Report, Mr. Williams assigned the case to Veronica James, a caseworker under his supervision. After reviewing the allegations with Ms. James, Mr. Williams instructed Ms. James to contact the source of the report of suspected child abuse to verify that the allegations contained in the 2221 Report were accurate and to obtain more information about the source's allegations. Ms. James attempted to speak with Mrs. Murphy by telephone on the afternoon of January 5, 1990,

but Mrs. Murphy had already left P.S. 230 for the day. Mr. Williams then instructed Ms. James to visit plaintiff's home along with a coworker, Thomas O'Connell, to investigate the allegations in the 2221 Report.

Ms. James and Mr. O'Connell visited the Tenenbaums at their home early that same evening. They identified themselves as employees of CWA and said that they were there to investigate allegations of suspected abuse, neglect or maltreatment. The Tenenbaums consented to have Ms. James examine Sarah for marks or bruises. Ms. James observed a strawberry mark on Sarah's inner thigh. Mrs. Tenenbaum advised Ms. James that this was a birthmark.

On Monday, January 8, 1990, Ms. James visited P.S. 230 to interview Mrs. Murphy and Sarah. Ms. James identified herself as being employed by CWA and explained that she was at P.S. 230 as part of an investigation into the allegations contained in the 2221 Report that had been called in by Ms. Raiten. Ms. James spoke with Mrs. Murphy, who related the basis for her understanding that Sarah had communicated to her that Sarah's father hurt her in her vaginal area.

After leaving the school, Ms. James reported what she had learned at P.S. 230 to Mr. Williams. Mr. Williams instructed Ms. James to go to P.S. 230 to effect an emergency removal of Sarah, pursuant to New York Social Services Law § 417 and New York Family Court Act § 1024, in order to have her medically examined for possible sexual abuse at Coney Island Hospital.

On Tuesday, January 9, 1990, Ms. James visited P.S. 230 and gave the school officials a form she signed which indicated that Ms. James, as a designated employee of a city department of social services, was taking Sarah into protective custody pursuant to Social Services Law

§ 417 and Family Court Act § 1024. Ms. James removed Sarah from school and took her to Coney Island Hospital early in the afternoon on January 9, 1990.

Sarah was examined by a pediatrician and a gynecologist at Coney Island Hospital. The medical report of the examination which was given to Ms. James on January 9, 1990 states that there was no apparent evidence of the introduction of a foreign object into Sarah's vagina but that sexual abuse could not be ruled out.

While Sarah was at Coney Island Hospital, Mr. Williams spoke with Mrs. Tenenbaum on the telephone to advise her that CWA had effected the emergency removal. Mrs. Tenenbaum went to CWA's Brooklyn Field Office, after her telephone conversation with Mr. Williams. Mr. Tenenbaum arrived later, at approximately 6:00 p.m. Ms. James took Sarah from the hospital to the Brooklyn Field Office after the medical examination was concluded. Sarah was at the hospital for approximately four hours.

Mr. Williams advised the Tenenbaums of the allegations of sexual abuse that had been made against Mr. Tenenbaum. He further advised the Tenenbaums that since the medical examination did not find evidence that Sarah was sexually abused, he was returning Sarah to the Tenenbaums' custody. Sarah was then returned to the Tenenbaums' custody and she returned home with her parents that evening.

Jurisdiction, Course of Proceedings, and Disposition in District Court

The District Court had jurisdiction of the original action herein pursuant to 28 U.S.C. § 1343, as this was an action brought pursuant to 42 U.S.C. § 1983, and pursuant to 28 U.S.C. § 1331, as this was a civil action raising questions of federal law. Plaintiffs sought relief from defendants under 42 U.S.C. § 1983, based on their claims

that, pursuant to a municipal policy or practice, the City defendants removed their infant daughter, Sarah, into City custody and arranged for a medical examination of Sarah, without notice to the Tenenbaums, their consent, or a Court order, and that such actions were violations of plaintiffs' constitutional rights. Plaintiffs also posed claims against the Board of Education, as well as state law claims against all defendants, over which the District Court had jurisdiction pursuant to the doctrine of pendent jurisdiction.

Defendants moved for summary judgment, and plaintiffs cross-moved for partial summary judgment. By Memorandum and Order dated September 30, 1994, the District Court denied in part and granted in part defendants' motion and denied plaintiffs' cross-motion (A57-96).

The Court ruled that all defendants were entitled to summary judgment on plaintiffs' substantive due process claim, as

> defendants' deprivation of the Tenenbaums of their child for a single afternoon for a medical examination did not significantly infringe their fundamental right to live together without interference from the state

(A66-67).

Next, the Court turned to plaintiffs' procedural due process claim regarding defendants' removal from school without either a court order or parental consent. The Court, noting that "[t]he pivotal question . . . is whether Sarah's removal was justified as an appropriate response to a legitimately perceived emergency," and, therefore "neither parental consent nor prior judicial approval was required" (A68), concluded that

> [a] CWA worker, in possession of [the information that Sarah had communicated to

> her teacher and the teacher had then reiterated to defendants James], would have reasonable cause to conclude that Sarah had been a victim of sexual abuse by her father, and that returning the child to her home would place her in imminent risk for further abuse

(A69) and that, therefore, an emergency was indicated (A69). Thus, the Court found,

> as a matter of law, that the information provided by [the teacher] to James established reasonable grounds for the emergency removal of Sarah. Accordingly, none of the defendants violated a due process right of any of the plaintiffs"

(A72), and the District Court found that all defendants were entitled to summary judgment on this claim (A72). The Court also found, as an alternate ground for granting summary judgment in favor of Williams, James, Flowers, and Trent, that they were entitled to qualified immunity (A72-73).

Next, the District Court addressed Marc and Mary Tenenbaum's claim that "defendants unconstitutionally interfered with their parental rights by having a pediatrician and gynecologist at Coney Island Hospital examine Sarah" (A73) and concluded that "[g]iven the highly intrusive nature of [the] examination, which was solely for investigative purposes," plaintiffs' constitutional rights had been violated (A73). The Court reasoned that once Sarah was in CWA's custody, "[s]he was then no longer in what was perceived to be harm's way" and, thus,

> procedural due process required notice to the parents and judicial authorization before

> Sarah could be subjected to an inspection of her vagina and surrounding area

(A73-74) (citing van Emrik v. Chemung County Dep't of Social Servs., 911 F.2d 863, 867 (2d Cir. 1990)). The Court also concluded that "Sarah, almost certainly, did, in fact, experience psychological injury on January 9, 1990" (A75). Thus, the Court found that plaintiffs' "procedural due process rights were violated by the manner in which Sarah was subjected to a medical examination" (A75). The Court did, however, find that Williams, James, Flowers, and Trent were entitled to qualified immunity and, thus, summary judgment on this claim, as "[t]he events at issue in the present case . . . occurred when the law . . . was not settled, prior to the Second Circuit's decision in van Emrik" (A75).

The District Court next turned its attention to plaintiffs' Fourth Amendment claims -- the seizure of Sarah from school and the medical examination of Sarah performed by doctors at Coney Island Hospital. While the Court did recognize that defendants' taking of Sarah from school into their custody did constitute a seizure implicating Sarah's Fourth Amendment rights, the Court found that such seizure did not implicate the parents' Fourth Amendment rights (A76-77). Regarding Sarah's Fourth Amendment right implicated by her removal, the Court found that both "the probable cause and warrant requirements apply to child abuse searches and seizures under the Fourth Amendment" (A83), and concluded that there was probable cause for Sarah's emergency removal and, thus, her Fourth Amendment rights were not violated by the removal (A84). Regarding the individual defendants, the Court also found that they were immune from liability on this claim

> because the application of the probable cause and warrant requirements to child

> abuse investigations by caseworkers was unsettled at the time of defendants' investigation, and still . . . is unclear

(A84), and, in any case, it was objectively reasonable for the individual defendants to believe they did not violate any Fourth Amendment rights by seizing Sarah (A84).

The District Court continued, concluding that plaintiffs have no constitutional "right to an 'adequate investigation' prior to 'endangerment' of their constitutional rights," noting that defendants had probable cause to seize Sarah (A87). The Court also found that plaintiffs have no private right of action under 42 U.S.C. § 671(a) upon which to base their claims that defendants failed "to make 'reasonable efforts' to provide services to preserve their family" (A88). The Court further found that Mary Tenenbaum's rights were not violated by virtue of Sarah's removal and examination based upon allegations of abuse by her husband alone -- and not by her (A88-89).

The District Court then addressed plaintiffs' claims against the Board of Education. The Court found no merit to plaintiffs' claim that the Board of Education should not have permitted CWA's removal of Sarah from school and further noted "the absence of any material fact which calls into question the propriety of what Murphy and the others at the school did, or did not do, regarding Sarah's removal" (A91). The Court did, however, rule that plaintiffs' claim "that school employees searched Sarah pursuant to Board policy, sometime prior to the CWA investigation" (A91) would survive summary judgment due to a material issue of fact (A91).

Finally, the Court granted summary judgment to all defendants on all of plaintiffs' state law claims. The Court based this resolution of the state law claims on the fact that New York law provides absolute immunity for both

municipal employees performing discretionary functions and for the municipality itself against claims based on discretionary acts of its officials (A94-95).

Defendants' Motion To Reconsider and Revise the September 30, 1994 Order and the Court's Order Denying Such Motion

On November 25, 1994, defendants filed a motion, pursuant to Federal Rules of Civil Procedure Rules 54(b) and 6(b) and Local Civil Rule 3(j), for reconsideration and revision of the District Court's September 30, 1994 Memorandum and Order. Defendants alleged that the Court had overlooked material facts and controlling authority in reaching its determination that defendants had violated the Fourth and Fourteenth Amendments by performing a gynecological examination of Sarah without either parental consent or a Court order.

By Memorandum and Order dated November 20, 1995 (A97-122), the District Court denied defendants' motion on the ground that such motion was untimely, as was conceded by defendants, and defendants, in the Court's opinion, did not offer a sufficient reason upon which the Court could base an exercise of discretion so as to enlarge the time for the motion and convince the Court to consider the motion on its merits.

The Trial on Damages and the Parties' Respective Notices of Appeal

Thereafter, a trial on damages was held, after which Marc and Mary Tenenbaum were awarded $1.00 each and Sarah Tenenbaum was awarded $15,000.

The City filed a Notice of Appeal dated November 18, 1997. Plaintiffs filed a Notice of Cross-Appeal dated December 4, 1997. A judgment was thereafter first issued in the Eastern District of New York on January 27, 1998.

That judgment was then replaced, due to errors contained within, with a corrected judgment, dated February 25, 1998.

Disposition in Court of Appeals

By opinion entered October 13, 1999, the Court of Appeals affirmed in part, vacated in part, and remanded the matter to the District Court. The Court of Appeals, inter alia, (1) reversed the decision of the District Court and denied summary judgment in favor of the municipal defendants on the Tenenbaums' and Sarah's procedural due process and Sarah's Fourth Amendment challenge to defendants' removal of Sarah from her school on January 9, 1990, upon an allegation that she had been sexually abused by her father and (2) affirmed the District Court's decision granting summary judgment in favor of plaintiffs on the Tenenbaums' and Sarah's procedural due process and Sarah's Fourth Amendment challenge to the medical examination of Sarah that occurred on the same date, following her removal, at Coney Island Hospital.

On plaintiffs' procedural due process claims, the Court of Appeals ruled that:

> a properly instructed jury could conclude that at the time the case-workers decided to remove Sarah, there was reasonably sufficient time, entirely consistent with Sarah's safety, to seek a court order

(A19) and that "[i]f there was a reasonably sufficient time, there was no emergency" (A19). Similarly, the Court of Appeals held that a violation of Sarah's Fourth Amendment rights would be and could reasonably be established if a jury were to find either (1) that Sarah's removal was effected without probable or reasonable cause to believe that Sarah would have been subject to the danger of abuse if not removed before court authorization could have been

obtained or (2) that the circumstances were not so exigent that a court order could not be obtained before removing Sarah without subjecting her to the danger of abuse (A34-40).

The Court, however, granted qualified immunity to the individual defendants, concluding that:

> not until today have we specifically held that where there is reasonable time consistent with the safety of the child to obtain a judicial order, the "emergency" removal of a child is unwarranted

(A22) and that, thus, the principle was not clearly enough articulated in 1990 "to require the defendants to answer in damages for their failure to abide by it at that time" (A22). The Court of Appeals further stated as follows:

> Because we now hold that it is unconstitutional for state officials to effect a child's removal on an "emergency" basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety, caseworkers can no longer claim, as did the defendants here, that they are immune from liability for such actions because the law is not "clearly established."

(A22). Similarly, for purposes of Sarah's Fourth Amendment claim relating to the removal, the Court concluded that the individual defendants were entitled to qualified immunity (A40).

The Court of Appeals, acknowledging the City's admission that both Sarah's removal and her examination were admittedly effected pursuant to City policy, concluded that a finding that the removal violated plaintiffs' procedural due process rights would result in City liability,

if such removal was made pursuant to a City custom or policy. Similarly, the Court of Appeals concluded, the City would also be liable for violating Sarah's Fourth Amendment rights relating to the removal (A41).

The Court of Appeals further held that Sarah's examination violated Sarah's and the Tenenbaums' procedural due process rights, because the purpose of the examination was investigative. The possibility of finding injuries in need of treatment, the Court of Appeals held, could not "turn an investigative examination into one that is 'medically indicated' and designed for treatment" (A27-28). The Court of Appeals further concluded that:

> if Sarah had ever been in imminent danger, she was not by the time she was taken to the hospital in the custody of the CWA [and that, therefore, t]he caseworkers were required under *van Emrik* either to notify the Tenenbaums that Sarah was about to undergo a medical procedure and obtain the approval of either of them or to obtain judicial authorization.

(A28). Similarly, the Court of Appeals agreed with the District Court's finding that the examination violated Sarah's "Fourth Amendment right to be free from warrantless searches" (A41).

The Court of Appeals did, however, conclude that the individual defendants were entitled to qualified immunity regarding the due process claims based upon the examination, because it had not already been clearly established at the time of the action in question herein that "subjecting a child to invasive investigatory medical examination in the course of an abuse investigation requires a court order absent parental consent" (A28). The Court of Appeals concluded similarly regarding the claim of a

Fourth Amendment violation against the individuals based on the examination (A42).

The Court of Appeals affirmed the District Court's grant of summary judgment in defendants' favor on plaintiffs' claim of violations of substantive due process (A28, A32).

Dissent in Court of Appeals

Judge Jacobs, in a separate opinion, concurred in part and dissented in part (A45-56). He agreed with the majority's dismissal of the Tenenbaums' substantive due process and state law claims. However, he "dissent[ed] from the remainder of the opinion," finding "no constitutional violation" and, thus, would not have reached the issues of qualified immunity or damages (A45).

Judge Jacobs found fault with the majority's announcement that there is no emergency, despite the presence of exigent circumstances, and, thus, a removal cannot be made without a court order:

> None of our cases has held that the availability of the emergency-removal exception depends on whether there is time to obtain judicial pre-authorization. Each of our prior cases requires only that an emergency exist, a fact that is determined by reference to the child's peril, not the case worker's schedule or the court's calendar. This is a sensible formulation, and one that keeps the child welfare worker focused on what matters first in these cases, the child's precarious welfare.

(A46). The dissent views the majority's error as one of "recast[ing] a child-welfare emergency in terms of a procedural emergency" (A46) and anticipates that it will

result in child-welfare workers deciding "to get a court order regardless of risk to the child" (A48).

Regarding the claims based on the examination of Sarah, Judge Jacobs concluded that the majority erred in finding that an examination serving a medical purpose in addition to a law enforcement purpose was "investigatory" as defined in van Emrik and, therefore, not permitted absent judicial authorization or parental consent (A53-56).

REASONS FOR GRANTING THE PETITION

The issues the petition presents have nationwide importance to local child welfare agencies and the public at large. This case implicates the substantial governmental interest in protecting its most vulnerable portion of the population -- children. The new restrictions imposed on local authorities by the Second Circuit herein greatly restrict government's ability even to try to ensure the safety of its children, while imposing upon government personnel the great fear of being held liable for making decisions that err on the side of child protection. The law, as stated and understood before the Court of Appeals' decision in this case, struck a fair and reasonable balance between the government interest in protecting children and families' interest in avoiding unwarranted government interference in their lives.

We respectfully urge that certiorari be granted, because the Court of Appeals imposed requirements upon child protective agencies that are unreasonable, impracticable, beyond the Constitution, and against the interests of public welfare.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT IMPROPERLY REDEFINED "EMERGENCY" AND IMPOSED A NEW STANDARD TO THE DETERMINATION OF WHAT CONSTITUTES AN EMERGENCY REMOVAL AND, THEREFORE, IS PERMITTED ABSENT A COURT ORDER.

As the dissent below notes, the decision of the Court of Appeals applies a new standard to the analysis of whether "emergency" circumstances existed and, thus, validate the removal of a child suspected of being the victim of abuse (A46). Whereas past analysis of whether the circumstances of a removal constituted an "emergency" previously has turned solely on an objective assessment of the perceived level of danger the child was in (A52), see, e.g., Ram v. Rubin, 118 F.3d 1306, 1311 (9th Cir. 1997); Robison v. Via, 821 F.2d 913, 922 (2d Cir. 1987); Lossman v. Pekarske, 707 F.2d 288, 291 (7th Cir. 1983), the Court of Appeals would have such analyses from hereon out depend on a determination of whether there is sufficient time to get a court order without the child being subjected to further danger (A18-20, A46-50, A52). This new standard announced by the Second Circuit herein finds no support in either the decisions of other circuits or the decisions of this Court.

The constitutionally protected interest in family relations, see Joyner v. Dumpson, 712 F.2d 770, 777-78 (2d Cir. 1983); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977), is limited by the compelling government interest in the protection of minor children, particularly where protection may be necessary against the parents themselves. See Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987). It falls upon the child welfare workers to

effectuate the appropriate balance between these competing interests.

Williams, the CWA supervisor who made the determination to remove Sarah, testified that he considered the situation on Tuesday, January 9, to be an emergency situation. Moreover, Williams explained that he waited until Tuesday, January 9, to effect the removal, because he wanted to speak with the Tenenbaums before making his decision on whether or not to effect an emergency removal of Sarah. When neither parent contacted him after they had, as far as he knew, been asked by James -- the caseworker -- to do so, he reasonably felt it was imperative to take temporary custody of Sarah. In this regard, it is clear that from defendants' perspective, the situation changed from Monday to Tuesday, and it is disingenuous of the majority in the Court of Appeals to suggest that the decision to remove Sarah could or should have been made on Monday. The facts herein demonstrate that Williams was mindful of his obligation to try to protect Sarah and that that obligation must be tempered by his need not to infringe on the Tenenbaums' right not to be subjected to undue government interference in their family integrity and Sarah's right not to be subjected to unreasonable search and/or seizure. The majority's decision herein punishes the City, and in the future may also punish the individual child welfare worker, for attempting not to act with too much haste and, rather, to reach a difficult balance in a delicate situation.

The sequence of events herein reveals a prudent approach by Williams, who was trying to protect all parties by first confirming or refuting the charges in less intrusive ways before moving to the need for an actual medical examination. Williams testified that he did not have enough information on Friday, January 5, to make a determination, because James had not yet spoken with the

source of the report, Sarah's teacher, Mrs. Murphy. Williams received James' report of her Monday, January 8, visit to P.S. 230 and the interviews she conducted with Sarah and Mrs. Murphy there that day. Williams waited until the following day to effect the emergency removal, because he was expecting a visit or call from the Tenenbaums to discuss the complaint against them. Williams wanted to talk with the Tenenbaums himself, to see if he could substantiate the claim even without a medical exam; if their statements were still equivocal, he knew he would then have enough evidence to constitute a need for the final step -- a medical examination, with or without the parents' permission. When Williams perceived that the Tenenbaums took the allegation of sex abuse so lightly that they did not even call him, it was reasonable for him to treat the situation as an emergency. Thus, contrary to the majority's suggestion, there was not a "delay" in removing Sarah from school; instead, there was a careful, progressive investigation that built to the point of requiring the emergency removal.[1]

The relevant question is whether there is an "emergency" at the time the decision is made to remove a

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[1] Whether Williams made the removal decision on Monday or Tuesday is not material. Based upon the information Williams possessed on Monday after James gave her report about her visit to the school, the circumstances were reaching the level of sufficient evidence of "serious ongoing abuse" with "reason to fear imminent recurrence," one of the federal standards for an emergency situation warranting a child's removal without a court order. The urgency of the situation certainly had increased to that point when Williams did not hear from the Tenenbaums, as he reasonably expected to, by the next morning. See Robison v. Via, 821 F.2d at 922. Moreover, if an emergency existed on Monday, such emergency certainly did not dissipate by Tuesday just because the child welfare workers either attempted not to act too hastily or otherwise did not effect the removal as early as theoretically possible.

child. The fact that a child welfare worker or an agency may not have acted as expeditiously as theoretically possible should not be permitted to neutralize "emergency" circumstances. Any delay in effectuating a removal is unrelated to whether "emergency" circumstances exist and should have no bearing on whether an "emergency" removal, without a court order, may be made. As Judge Jacobs noted:

> child welfare officers often must practice triage, deciding which endangered child must wait while another one, in seemingly greater peril, takes precedence. Decisions on emergencies are delayed, reviewed and reconsidered, or stuck in a superior's in-box. And even a child welfare worker over-burdened with real emergencies is a human being who might go to lunch, take a personal day, go home on time, or spend weekends at home.

(A51). Given limited staff and resources, action cannot always be taken at the theoretically earliest possible moment. Any lapse of time, however, can not change the nature of the circumstances a child is in. If it is an emergency, it is an emergency. A caseworker's "delay" does not change the imminence of the danger a child may be in and should not be a reason for creating any further delay in taking a child out of harm's way.

The Second Circuit had previously held that for emergency circumstances to exist, "it is sufficient if the officials have been presented with evidence of serious ongoing abuse and therefore have reason to fear imminent recurrence." Robison v. Via, 821 F.2d at 922. The Court of Appeals herein announced a new rule, which (1) would make the determination of whether particular circumstances

constituted an "emergency" for removal purposes turn on the limitations of government resources and a second-guessing of "bureaucratic practice and technique" (A49) and (2) would cause child welfare workers to refrain from making necessary emergency removals for fear of being held liable for such action (A51-52).

II.

DEFENDANTS' DECISION TO HAVE SARAH PHYSICALLY EXAMINED IMMEDIATELY UPON HER ARRIVAL AT CONEY ISLAND HOSPITAL WAS JUSTIFIED AS NECESSARY TO DIAGNOSE HER CONDITION AND TO DETERMINE WHETHER SHE WAS IN NEED OF IMMEDIATE MEDICAL TREATMENT.

As it did with regard to the test it enunciated for determining whether a removal constitutes an "emergency" removal, the Court of Appeals erroneously imposed a subjective and impossible-to-apply test to the analysis of whether a medical examination was permissible absent either parental consent or a court order. Moreover, the new standard announced by the Second Circuit surely will result in increased suffering of abused children.

In van Emrik v. Chemung County Department of Social Services, 911 F.2d 863 (2d Cir. 1990), the Second Circuit addressed the question of when a physical examination is lawfully conducted in the course of a child abuse investigation. Therein, this Court found that long-bone x-rays performed in search of evidence of past abuse "were not medically indicated," id. at 867, as they "were not sought to facilitate diagnosis or treatment . . . but to provide investigative assistance to the caseworker." Id. As Judge Jacobs aptly has recognized:

> in *van Emrick* (sic), there was no question that the examination was conducted exclusively to further the forensic investigation: the case worker was seeking evidence of *healed* fractures . . . . The holding of *van Emrik* therefore extends no further than instances in which medical justification is lacking. The case should not be read to bar physical examinations that serve a medical purpose, even if a law enforcement purpose is served as well.

(A55).

Despite the differences between the cases, van Emrik, nonetheless, set forth the principles and standards to be applied herein, clearly barring child welfare workers from obtaining a medical examination that is not medically indicated of a child suspected of being the victim of abuse, absent either parental consent or court authorization (A55). See, generally, van Emrik v. Chemung County Dep't of Social Servs., 911 F.2d 863. In van Emrik, the record clearly established that the sole purpose of the x-rays was to determine if the child had suffered previous injuries that had healed and gone undetected. See id. at 865. Further, there was no possibility that if the x-rays were not taken immediately, there would be an impact on either the preservation of evidence or the potential danger to the child. Here, however, defendants were searching for current injuries, which may have required immediate treatment. Unlike in van Emrik, not only is there no basis for concluding that the examination herein was solely investigative in nature, but the circumstances herein indicate otherwise.[2] There was a serious possibility that

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[2] In the trial on damages herein, Dr. Warren Seigel, the Director of Adolescent Medicine at Coney Island Hospital in 1990, confirmed that in 1990, the purpose of an examination of a five year old girl brought in

sexual abuse might have taken place in the recent past. If it had, Sarah could have suffered some injury that would be detected only by an examination. If Sarah had had an injury, she may have needed treatment.

The Court of Appeals erroneously decided this issue herein upon a blind adherence to the concept of "investigation" as was appropriately contemplated in van Emrik, based on the facts of that case. Here, the investigatory element of the examination was not merely forensic but was also medical. By failing to recognize that element of this case, which distinguishes it from van Emrik, the Court of Appeals failed to heed this Court's instruction in New Jersey v. T.L.O., 469 U.S. 325 (1985), wherein this Court explicitly stated that the constitutional propriety of a search made without prior judicial authorization "depends on the context within which a search takes place." Id. at 337.

Especially given that Sarah was electively mute, the caseworker could not engage her in conversation to obtain any information about how recently any incident of abuse had taken place and, thus, could not rule out the possibility that Sarah had recently been subjected to abuse and needed immediate medical attention. See Chayo v. Kaladjian, 844 F. Supp. 163, 169 (S.D.N.Y. 1994). Here, the investigative nature of the examination under all the circumstances necessarily encompassed a diagnosis and an assessment of whether Sarah needed immediate treatment. As Judge Jacobs recognized, the medical examination of Sarah was not "purely investigatory,' as *van Emrik* used that term" (A55). Rather, unlike the x-rays in van Emrik, which were performed purely in order "to further the forensic

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to the Hospital with a report of possible sexual abuse was to determine whether the child was injured and needed treatment as well as simply to determine whether, in fact, she had been abused.

investigation" (A55), the examination here had another and distinct medical "investigatory" purpose. "[T]he district court (as well as the majority opinion) fail to appreciate that *medical diagnostics* is also "investigatory" -- in the sense that the physician investigates whether the patient would benefit from treatment" (A55).

For these reasons, not only did performance of the examination not constitute a violation of plaintiffs' Fourteenth Amendment rights, it also did not constitute a violation of Sarah's Fourth Amendment rights. Performance of the medical examination was not unreasonable on the facts here. There was a legitimate and substantial concern that Sarah had been sexually abused and was possibly injured thereby and in need of medical treatment. A balancing of the interests in protecting Sarah from sexual abuse and providing her with necessary medical treatment versus the interest in not invading her personal rights favors conducting the examination under the circumstances presented herein. See Darryl H. v. Coler, 801 F.2d 893, 900-05 (7th Cir. 1986). As in Darryl H., where the Court recognized that a visual inspection by a caseworker can be reasonable in a case of physical abuse, as it could easily reveal evidence of such abuse, a somewhat more intrusive examination by a physician is appropriate in a case of suspected sexual abuse as is presented here, as such an examination would be necessary to reveal evidence of abuse of a sexual nature.

Here, pursuant to New York Social Services Law § 383-b, when the City made the emergency removal of Sarah, which defendants maintain was lawful, see Point I, supra, the Commissioner of Social Services assumed temporary custody of Sarah and the responsibilities accompanying such custody, such as providing adequate medical care. See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 200 (1989); Marisol A. v.

Giuliani, 929 F. Supp. 662, 676 (S.D.N.Y. 1996). If the law does not permit an examination as was made here, upon a legitimate suspicion that a child has been sexually abused, then there will surely be a case in which there is a similar suspicion of abuse that proves to be true, in which an injury to a child goes untreated and the injury is aggravated, because the City did not examine the child until it first obtained a court order, which was not immediately obtainable. Then, not only would the child not have received appropriate medical treatment, but the City might be sued for not having provided adequate treatment in what would surely be alleged to have been a situation where such treatment was "medically indicated." Or, the City will refrain from performing an examination while awaiting a court order, which could take a few days, and in the meantime, evidence of the abuse will disappear and the child will be returned to the same environment and suffer further abuse.

Moreover, the Court of Appeals' new standard improperly turns on the subjective assessment of the child welfare worker, instead of on an objective view of the circumstances. Defendants urge that such important determinations should not depend on the personality, character, whim, or acuteness of the particular child welfare worker assigned to a particular abuse case. The Court of Appeals' determination on this issue appears to turn on Williams' testimony that the purpose of the examination was to determine if abuse had occurred (A27-28). If Williams' sole or primary concern had been to detect and treat any injuries, perhaps the majority would have found the examination here constitutionally permissible. Defendants respectfully submit that Williams' purpose should not be determinative of this issue. Rather, the circumstances alone should determine whether the action taken was appropriate. Here, as there was a real possibility that Sarah had injuries and required treatment, the

examination should be deemed to pass constitutional muster.

The examination here at issue was, at least in part, performed in order for defendants to determine whether Sarah was injured and in need of medical treatment. In addition, if there had been evidence of abuse, such evidence might have dissipated while awaiting a court order. It is naive of the Court of Appeals to liken this case to Chayo v. Kaladjian, 844 F. Supp. 163 (S.D.N.Y. 1994) and Schwimmer v. Kaladjian, 988 F. Supp. 631 (S.D.N.Y. 1997), aff'd, 164 F.3d 619 (2d Cir. 1998), cases involving suspected abuse in which physical examinations conducted without court orders were upheld as "medically indicated" where the children had visible bruises. Unlike a case in which a child is suspected of being beaten, for example, a child suspected of being the victim of sexual abuse likely will not have obvious injuries. Rather, an examination would be necessary both to detect any injuries and to determine if treatment is needed. Under all these circumstances, the competing interests should give way to the protection of the child.

As Dr. Seigel, the doctor in charge of Adolescent Medicine at Coney Island Hospital at the time later testified, it was a routine practice at Coney Island Hospital to perform medical examinations of children suspected of being the vietims of sexual abuse, in order to determine whether they required immediate medical treatment. Sarah's condition and need for treatment were unknown to defendants. Especially as she was electively mute and did not communicate with defendants, defendants could have discovered if she was injured and in need of treatment only by having her examined by medical personnel. The Fourth Amendment is satisfied because the performance of such an examination in the face of the evidence here, indicating that Sarah may have been sexually abused, was entirely

appropriate and reasonable. In van Emrik, as this Court ruled, the x-rays that were found to be unlawfully taken without a court order did not facilitate either diagnosis or treatment. See van Emrik v. Chemung County Dep't of Social Servs., 911 F.2d 863, 867 (2d Cir. 1990). Here, the examination not only facilitated but clearly was necessary to make both a diagnosis and a determination as to whether treatment was needed. As such, the cases are entirely distinguishable.

Finally, the Court of Appeals' observation that "if Sarah had ever been in imminent danger, she was not by the time she was taken to the hospital" (A28), further highlights the Court's failure to acknowledge the possibility that Sarah had injuries and was in need of treatment. The fact that she may no longer have been in imminent danger of further abuse has no relevance to whether she may have needed treatment for any recent abuse. Certainly, merely being in CWA custody does not protect a child from the effects of past abuse, particularly if CWA is not permitted to take the steps necessary to detect any such abuse and treat any injuries therefrom.

Defendants maintain, as they have throughout, that if, under circumstances such as those presented here, they could not arrange to have a medical examination performed without a court order, the result, in some cases, would be that abused children would be returned to abusive households because the evidence of the abuse would have disappeared by the time the examination was performed. And in some cases, necessary treatment would be denied or at least delayed, because defendants were not able to discover that it was needed. The choice is between erring on the side of performing medical examinations on children regarding whom no evidence of abuse is ultimately found or not performing them on children regarding whom evidence of abuse exists but is not found, resulting in the

children being subjected to further abuse. The impact of the Court of Appeals decision herein will be both widespread and of great magnitude. As the Court of Appeals has created an unprecedented standard that is unsupported by any decision of this Court, this is an appropriate matter for this Court's review.

CONCLUSION

For the reasons set forth, petitioners respectfully ask this Court to grant their petition for a writ of certiorari.

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February 18, 2000

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: September 9, 1998 Decided: October 13, 1999)

Docket Nos. 97-9488(L), 97-9554(XAP)

MARC TENENBAUM and MARY TENENBAUM, individually and on behalf of SARAH TENENBAUM, an infant,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

NAT WILLIAMS, individually and as a caseworker, Child Welfare Administration, VERONICA JAMES, individually and as a caseworker, Child Welfare Administration, DOBY FLOWERS, individually and as Commissioner of Social Services of the City of New York, and BROOKE TRENT, individually and as Deputy Commissioner of Social Services of the City of New York,

Defendants-Cross-Appellees,

NEW YORK CITY,

Defendant-Appellant-Cross-Appellee,

MARVA LIVINGSTON, as Commissioner of Social Services of the City of New York, CLAUDE MEYERS, as Deputy Commissioner of Social Services of the City of New York,

Appellants-Cross-Appellees,

and NEW YORK CITY BOARD OF EDUCATION,

Defendant.

Before:

MCLAUGHLIN, JACOBS and SACK,

Circuit Judges.

Appeal and cross-appeal from a judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, *Judge*) in plaintiffs' action against the defendants under 42 U.S.C. § 1983 (i) awarding plaintiffs damages on their claims against some of the defendants on the grounds that (a) the plaintiffs' and their daughter Sarah's procedural due-process rights were violated by the performance of a medical examination on Sarah in connection with child-abuse allegations against her father without the plaintiffs' permission or court authorization, and (b) Sarah's Fourth Amendment right to be free from unreasonable searches was violated by the same examination; and (ii) granting defendants' motion for summary judgment as to, *inter alia*, (a) plaintiffs' claims that their and Sarah's procedural due-process rights were violated by the removal of Sarah from school for the purpose of conducting the medical examination, (b) plaintiffs' claim that Sarah's Fourth Amendment right to be free from unreasonable seizures was violated by her removal from school, (c) plaintiffs' claims that their and Sarah's substantive due-process rights were violated by Sarah's removal from school, (d) plaintiffs' claims under state law, and (e) plaintiffs' claims against the individual defendants because all such claims were barred on the grounds of qualified immunity. Plaintiffs also challenge the district court's award of damages as insufficient to compensate them and Sarah for the constitutional violations they suffered.

Affirmed in part, vacated in part, and remanded. Judge Jacobs concurs in part and dissents in part in a separate opinion.

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Diane Redleaf, Lehrer & Redleaf, Chicago, Ill., *for Amicus Curiae National Coalition for Child Protection Reform*.

SACK, *Circuit Judge*:

On Tuesday, January 9, 1990, at about noon, a caseworker from the New York City Child Welfare Administration (the "CWA") removed five-year-old Sarah Tenenbaum from her kindergarten class at P.S. 230 in Brooklyn, New York, pursuant to the emergency removal provisions of New York Social Services Law § 417[1] and New York Family Court Act

[1] Section 417 states, in pertinent part, that specified public officials "shall take all appropriate measures to protect a child's life and health including, when appropriate, taking or keeping a child in protective custody without

§ 1024,[2] without court order and without notifying or receiving authorization from either of her parents, Marc and Mary Tenenbaum (the "Tenenbaums"). Sarah was taken to the emergency room at Coney Island Hospital where a pediatrician and a gynecologist examined her for signs of possible sexual abuse. When they found none, she was returned to her parents. The case was abandoned as "unfounded."

The Tenenbaums brought suit in the United States District Court for the Eastern District of New York against, *inter alia*, New York City (the "City"), the CWA, and CWA employees. The City appeals from a money judgment against it in the district court (Denis R. Hurley, *Judge*) based on the district court's finding that the medical examination performed without either parental consent or court order deprived the Tenenbaums and their daughter of procedural rights guaranteed by the Due Process Clause of the Fourteenth Amendment, and infringed Sarah's right to be free from unreasonable searches under the Fourth Amendment applied to the States through the Fourteenth. The Tenenbaums, for themselves and their daughter, cross-appeal from the judgment of the district court insofar as it granted defendants' motion for summary judgment dismissing their claim that the defendants' removal of Sarah from school without their consent or court authorization was a violation of their and Sarah's procedural and substantive rights under the Due Process Clause of the Fourteenth Amendment. They also appeal the court's holding that

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the consent of a parent or guardian if such person has reasonable cause to believe that the circumstances or condition of the child are such that continuing in his or her place of residence . . . presents an imminent danger to the child's life or health." N.Y. Soc. Serv. Law § 417(1)(a) (McKinney 1999).

[2] Section 1024 is substantially similar to § 417 but adds that, in order to effect an emergency removal without a court order, there must not be enough time to apply for such court order. *See* N.Y. Fam. Ct. Act § 1024(a)(ii) (McKinney 1999).

Sarah's removal from school was, as a matter of law, not a violation of her right under the Fourth Amendment, as applied to the States through the Fourteenth, to be free from unreasonable seizures. Further, the Tenenbaums challenge the district court's finding on summary judgment that the individual defendants are entitled to qualified immunity on all the claims against them. The Tenenbaums also contend that their state-law claims should not have been dismissed. Finally, the Tenenbaums challenge the district court's damage award, arguing that it is insufficient to compensate them for the constitutional violations they suffered.

We affirm the judgment insofar as it holds that the medical examination violated the Tenenbaums' and Sarah's procedural due-process rights and Sarah's Fourth Amendment rights and awards damages therefor. We disagree with the Tenenbaums that there is a triable issue of fact as to whether Sarah's removal violated substantive rights accorded by the Due Process Clause, and we affirm that part of the district court's judgment. We conclude, however, that there is a triable issue of fact as to whether the defendants' removal of Sarah from school was contrary to the procedural requirements of the Due Process Clause and to Sarah's right to be free from unreasonable seizures under the Fourth Amendment. Because we also agree with the district court that the individual defendants are entitled to qualified immunity, however, we vacate in part and remand only with respect to the City. We affirm the district court's award of damages, recognizing that the court may make an additional award should the Tenenbaums prevail on the claims that we remand for trial.

Background

The facts underlying this appeal are largely undisputed. Five-year-old Sarah Tenenbaum, a kindergartner at P.S. 230 in Brooklyn, was "developmentally delayed" and afflicted with "elective mutism"—only rarely would she speak to others outside of her home. In school, non-verbal or limited verbal communication was therefore typical. Sarah's teacher, Mary Murphy, was in her third year as a teacher, her first as a kindergarten teacher. Sarah communicated with Murphy by showing her pictures she (Sarah) had drawn or by speaking in one- or two-word sentences.

On Thursday, January 4, 1990, Sarah slept while her class was being told a story and attendance was being taken. When she awoke, she was crying. Murphy asked Sarah why; Sarah did not respond. Murphy persisted, asking Sarah whether anyone in the class had hurt her. Sarah shook her head "no." When Murphy asked whether someone at home had hurt her, Sarah nodded "yes." Then, according to Murphy, she "went down the list of people that were in [Sarah's] life . . . all of which [Sarah] shook her head, no, to. When [Murphy] asked [Sarah] if her father was hurting her, her eyes welled up in tears and she shook her head, yes, and she started to really cry."

Later that day, Murphy talked to Sarah again and asked Sarah to indicate on a doll she was holding where Sarah was being hurt. Sarah pointed to the groin area of the doll. In order to make sure she was not misunderstanding Sarah, Murphy asked Sarah to indicate again where she was being hurt and Sarah again pointed to the doll's groin area. Murphy did not report the incident that day.

During the following day, Friday, January 5, according to Murphy, Sarah drew a picture of two figures. Murphy asked

Sarah what was happening in the picture and Sarah said "Sarah and . . . Daddy kneeling, hurt," and then fell silent.

Murphy reported Sarah's behavior to her superiors at P.S. 230 as required by sections 413 and 415 of the New York Social Services Law.[3] She also reported that Sarah often slept in class and that she did not interact with other children. A guidance counselor at P.S. 230 in turn reported the matter by telephone to the New York State Department of Social Services' Central Register of Child Abuse and Maltreatment that day, also as required by law.

An operator at the State agency made a record of the counselor's call on a department "Form 2221": "Sarah is speech and language delayed. Sarah is unable to stay awake during the day. Ch[ild] often naps off and on all day. Ch[ild] is nervous and withdrawn. Ch[ild] is afraid of fa[ther]. Fa[ther] hurts her vaginal area at night." The department telecopied the Form 2221 to defendant Nat Williams, a supervisor in the child protective unit of the CWA in Brooklyn. Williams received it at about noon that day, Friday.

Williams then met with a recently hired provisional caseworker, defendant Veronica James, and assigned her to the Sarah Tenenbaum case. Williams instructed James to contact Sarah's teacher, Murphy, about the allegations contained in the Form 2221. James attempted to reach Murphy at the school, but Murphy had left for the weekend.

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[3] Section 413 lists the persons and officials who are required to report cases of suspected child abuse or maltreatment to the State, and includes teachers in public schools. That section also permits such persons who are members of the staff "of a medical or other public or private institution, school, facility or agency," to report the suspected abuse to the person in charge of such institution who then becomes responsible for reporting the suspected abuse to the State. *See* N.Y. Soc. Serv. L. § 413(1). Section 415 sets forth the proper procedures for such reporting.

Williams also told James to visit the Tenenbaums' home that evening to examine the child for marks and bruises, to assure herself that Sarah's living conditions were acceptable, and to discuss with the Tenenbaums Sarah's sleeping in school and her delayed development. Williams issued explicit instructions to James not to raise the issue of sexual abuse.

That evening, James, accompanied by colleague Thomas O'Connell, who was sent along by Williams in case any male children might be involved, arrived unannounced at the Tenenbaums' home. James told the Tenenbaums that she and O'Connell were investigating a report that Sarah was developmentally delayed and was sleeping in school. In accordance with Williams' instructions, they did not mention the real reason they were there—the reports of possible sexual abuse.

The Tenenbaums discussed Sarah's developmental problems with the caseworkers and gave James the names of several physicians who regularly treated Sarah and her younger brother. The Tenenbaums, as requested, also furnished James with signed releases permitting CWA personnel to review the doctors' records. The Tenenbaums permitted James and O'Connell, respectively, to inspect Sarah's and her brother's partially uncovered bodies for marks or bruises. The caseworkers found no signs of maltreatment on either child. James and O'Connell also learned that Mrs. Tenenbaum, a nurse, sometimes worked during the evenings but that Mr. Tenenbaum, a plumber for the City school system, was home during the evenings. The Tenenbaum home seemed to the caseworkers to be neat and well-cared for.

There is a dispute about what the caseworkers told the Tenenbaums would happen next. Williams had told James, during their initial meeting about the case earlier in the day, to instruct the Tenenbaums that they were to contact Williams

the following Monday. James testified that she delivered the message. The Tenenbaums each claimed that James made no such request and had not left a telephone number where she, O'Connell, or their supervisor could be reached. In any event, not having been told about the sexual abuse charges, the Tenenbaums did not know that Mr. Tenenbaum was suspected of wrongdoing or that anyone thought that Sarah might be in imminent danger of physical harm.

James and O'Connell left the Tenenbaum home, James reported their observations to Williams by telephone, and the caseworkers went home for the weekend. Sarah remained at her home with her parents. Neither Williams, James, O'Connell nor anyone else took further action in Sarah's case over the weekend. Although the CWA maintains an emergency children's services unit that is on call nights and weekends, no one contacted it about the Tenenbaum situation. Neither did Williams, James, O'Connell or anyone else then or during the week that followed try to reach Sarah's doctors to discuss the possibility of abuse. There is similarly no indication that anyone attempted to find teacher Murphy at her home or elsewhere over the weekend to try to determine the nature and extent of the evidence that Sarah had been abused.

On Monday, January 8, James visited P.S. 230. She met Murphy, who reiterated what had happened the week before. James tried to question Sarah directly; Sarah did not respond. Murphy then asked Sarah if her father touched her in the vaginal area and hurt her. Sarah shook her head "no." But Sarah shook her head "no" to every question Murphy asked in James' presence, including whether her mother bathed her.

James returned to her office and reported to Williams on her visit. Williams testified that after being told by James that Murphy had confirmed the information contained on the Form 2221 received Friday, he decided to wait for the call he

expected from Mr. or Mrs. Tenenbaum. The call never came. The Tenenbaums, as already noted, deny that they had ever received any request to contact Williams. Neither did Williams call the Tenenbaums even though he knew how to reach them. After James completed her report, Williams told her to work on other cases for the remainder of the day.

Based on what he termed his "assessment of the case including Miss Murphy's account" and the failure of the Tenenbaums to contact him, Williams decided that on Tuesday, the day after he received James's report, he would have Sarah removed from school in order to have her physically examined "to rule out [the possibility of] sexual abuse."[4] James says that at her meeting with Williams on Monday she was "instructed that [James] would have to take the child to the hospital." When asked why she did not remove Sarah until the next day, James testified that she did not recall. Williams testified that he did not decide until Tuesday morning to have Sarah removed from school. "I decided just to do it on Tuesday."

Although CWA lawyers were on staff at Williams' and James' office, neither sought legal advice before removing Sarah from school and subjecting her to the examination. Neither Williams nor James made an attempt—indeed, no one considered making an attempt—to obtain parental consent for a physical examination of Sarah as provided by § 1021 of the New York Family Court Act.[5] And no one considered seeking

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[4] The defendants assert in their reply brief on appeal that Williams was justified in treating Sarah's situation as an emergency by the end of the day Monday because he thought the Tenenbaums had been told to telephone him that day and "the Tenenbaums took the allegation of sex abuse so lightly that they did not even call him." But, as Williams was of course aware, the Tenenbaums knew nothing about the sexual abuse allegation because he had given the order that they not be told about it.

[5] Section 1021 of the New York Family Court Act provides that an authorized official may temporarily remove a child who is abused or neglected

a court order for her removal and examination under § 1022 of that Act[6] even though Williams understood that such an order could be obtained within a day.[7]

Williams' decision to proceed on an "emergency" basis rather than to seek parental consent or a court order was not aberrational. Although legal counsel was readily available, Williams "seldom" sought it before effecting a child's removal. Williams indicated that only if CWA had "decided to keep" Sarah following her removal and physical examination would court action have been sought. He described as standard office procedure the removal of a child first and the seeking of a court order later, if and after abuse was established. *See also* N.Y. Fam. Ct. Act § 1022 (McKinney 1999), *Practice Commentaries*, Douglas J. Besharov at 10 (stating that it is "common to take emergency protective action without prior court review" in New York City in contrast with procedures used in other parts of the State). In the district court, the defendants "stipulated that the removal of Sarah and her subsequent examination for suspected child abuse were done pursuant to CWA policy." *Tenenbaum v. Williams*, 91-CV-0037 (DRH), Memorandum and Order at 2-3 (E.D.N.Y. Oct. 21, 1997). And at oral argument on this appeal, counsel for the defendants, when asked whether the City condoned the defendants' actions, responded "Yes, and they do it routinely. That is the policy."

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under the Act with the written consent of the child's parents or other person legally responsible for his or her care. *See* N.Y. Fam. Ct. Act § 1021.

6 Section 1022 provides that under certain circumstances the family court may enter an order directing the temporary removal of a child from the place where he or she is residing. *See* N.Y. Fam. Ct. Act § 1022.

7 Counsel for the defendants on this appeal conceded at oral argument that "perhaps, in this case, a court order if sought could have been obtained on that day."

Following Williams' instruction, James went to P.S. 230 on Tuesday, January 9 at about noon, without court order or parental consent, and effected an "emergency" removal of Sarah for the purpose of determining whether she had been sexually abused. The school, as a matter of policy, consented.[8]

James, by herself, took Sarah to the emergency room at Coney Island Hospital where, after several hours' delay, Sarah was examined by both a pediatrician and a gynecologist. The gynecological examination included the insertion of a cotton swab in Sarah's vagina and anus. No evidence of sexual abuse was discovered, although the hospital report stated that it could not be ruled out.

While James and Sarah were at the hospital, Williams contacted Mrs. Tenenbaum and told her that Sarah had been taken from school. Mrs. Tenenbaum telephoned her husband and both parents went to Williams' office. When they arrived, Williams confronted Mr. Tenenbaum for the first time with the sexual abuse charge. He heatedly denied it.

After Sarah's physical examination was complete, James brought Sarah to the CWA office, where she was returned to her parents sometime between 7:30 and 8:30 that evening. Williams told the Tenenbaums that they could take Sarah home because no evidence of sexual abuse had been discovered. No further action was taken on the charge. Williams ultimately marked Sarah's case "unfounded."

In January 1991, the Tenenbaums filed a complaint in the United States District Court for the Eastern District of New York pursuant to 42 U.S.C. § 1983 against Williams, James

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[8] Section 2.2 of the Regulation of the Chancellor relating to Reports of Suspected Child Abuse and Maltreatment then in effect read in part: "The school must permit Child Protective Services workers to take children into their custody, upon their presentation of either a court order or a written statement from the Office of Special Services for Children."

and several other City officials, as well as the City of New York and the New York City Board of Education. The complaint alleged various constitutional and state-law violations by the defendants against the Tenenbaums in both their individual capacities and on behalf of Sarah.

The defendants moved for summary judgment and the Tenenbaums cross-moved for partial summary judgment. On September 30, 1994, the district court granted defendants' motion in part and denied it in part. *Tenenbaum v. Williams*, 862 F. Supp. 962 (E.D.N.Y. 1994) ("*Tenenbaum I*"). The court concluded that neither the Tenenbaums' or Sarah's substantive due-process claims nor their procedural due process or Fourth Amendment claims based on Sarah's removal were meritorious. Even if they were, the district court held, the individual defendants were entitled to qualified immunity. The court found as a matter of law, however, that the judicially unauthorized medical examination violated the Tenenbaums' and Sarah's procedural due-process rights and Sarah's Fourth Amendment right to be free from unreasonable searches. Although the individual defendants were entitled to qualified immunity on this claim, the City of New York was subject to suit. The court further found that there were disputed factual issues surrounding a separate physical search claim against the Board of Education, a claim the Tenenbaums nonetheless subsequently withdrew. The court dismissed all of the Tenenbaums' state-law claims and denied the Tenenbaums' partial summary judgment motion.

The City moved for reconsideration and reargument on November 25, 1994. The district court denied the motion as untimely under local procedural rules, but stated that had reargument been granted the court would have adhered to its original decision—that Sarah's medical examination violated the plaintiffs' and Sarah's procedural due-process rights and Sarah's Fourth Amendment rights. *Tenenbaum v. Williams*,

907 F. Supp. 606, 618 (E.D.N.Y. 1995) ("*Tenenbaum II*"). The City then conceded that the actions of Williams, James and the CWA, which formed the basis of the viable claims, were taken pursuant to City policy and that the City was therefore responsible for them. *Tenenbaum v. Williams*, 91-CV-0037 (DRH), Memorandum and Order at 2-3 (E.D.N.Y. Oct. 21, 1997) ("*Tenenbaum III*"). The court held a damages trial on March 10 and 18, 1997. It awarded damages in the amount of $15,000 to Sarah and $1.00 each to Mr. and Mrs. Tenenbaum. *Id.* at 7-12. These cross-appeals followed.

Discussion

I. Procedural Due-Process Claims

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The Tenenbaums claim that they have a liberty interest in the care, management and custody of their daughter Sarah, and that her removal from school without their consent and without court authorization deprived them of that interest without due process of law. The district court disagreed, finding that reasonable grounds existed for Sarah's emergency removal. *Tenenbaum I*, 862 F. Supp. at 969-72. The court also found that even had the individual defendants violated plaintiffs' due-process rights, those defendants were entitled to qualified immunity because officials "of reasonable competence could disagree on whether [there was] probable cause" for Sarah's removal. *Id.* at 972 (internal quotation marks and citation omitted).

The Tenenbaums claim a similar liberty interest with respect to their daughter's subjection to a medical examination. The district court agreed. In contrast to its conclusion as to Sarah's removal, the court held that the defendants'

actions violated the Tenenbaums' and Sarah's procedural due-process rights as a matter of law. It reasoned that whatever emergency may have existed at the time of Sarah's removal from school, it had abated by the time Sarah was at the hospital. Because there was no emergency, absent parental consent judicial authorization was required by the Due Process Clause. It had not been obtained. *Id.* at 972-73. The court nevertheless found that the individual defendants were entitled to qualified immunity on this claim too, and granted summary judgment to them on that basis. *Id.* at 973. The City, to which the qualified immunity defense does not apply, was held potentially liable on this claim and the court denied summary judgment as to it. *See id.* After the district court denied its motion for reargument, the City conceded that the actions of the CWA caseworkers were taken pursuant to City policy. *See Tenenbaum III*, at 2-3. A damages trial followed and the court awarded the plaintiffs and Sarah damages on this claim. *See Tenenbaum III*, at 7-12.

On appeal, the Tenenbaums contend that the district court erred when it granted summary judgment for the defendants on the Tenenbaums' claim that, aside from the medical examination, Sarah's removal from school violated their and Sarah's due-process rights. They also challenge the district court's finding that qualified immunity shields the individual defendants from liability. For its part, the City asserts that the district court erred in holding that the medical examination violated the plaintiffs' due-process rights. The Tenenbaums argue that this aspect of the court's decision was correct, but insist that the individual defendants are not entitled to qualified immunity as to this claim.

This Court reviews the district court's grant of summary judgment *de novo*, *see Maguire v. Citicorp Retail Servs., Inc.*, 147 F.3d 232, 235 (2d Cir. 1998), and we construe the evidence in the light most favorable to the non-moving party.

See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). We will affirm the decision only if the record indicates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Stuart v. American Cyanamid Co.*, 158 F.3d 622, 626 (2d Cir. 1998) (quoting *Anderson*, 477 U.S. at 248), *cert. denied*, 119 S. Ct. 1456 (1999).

A. *Sarah's Removal*

1. *Constitutional Violation*

"Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as 'of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (internal citation omitted). Parents therefore have a constitutionally protected liberty interest in the care, custody and management of their children. *See Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Hurlman v. Rice*, 927 F.2d 74, 79 (2d Cir. 1991); *van Emrick v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990); *see also Stanley v. Illinois*, 405 U.S. 645, 649-52 (1972) (rights to conceive and raise one's children have been deemed "essential" and "basic civil rights of man"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (the custody, care and nurture of the child reside first with the parents); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty guaranteed by the Fourteenth Amendment includes the right to establish a home and bring up children); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (recognizing the

right of the family "to remain together without the coercive interference of the awesome power of the state"). As a general rule, therefore, before parents may be deprived of the care, custody or management of their children without their consent, due process—ordinarily a court proceeding resulting in an order permitting removal—must be accorded to them. *See Stanley*, 405 U.S. at 649, 651; *Hurlman*, 927 F.2d at 79 (such due process is "generally in the form of a predeprivation hearing"); *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) (due process "would generally require a predeprivation hearing").

At the same time, however, the State has a profound interest in the welfare of the child, particularly his or her being sheltered from abuse. In " 'emergency' circumstances," *Hurlman*, 927 F.2d at 80 (citing *Robison*, 821 F.2d at 921), a child may be taken into custody by a responsible State official without court authorization or parental consent. "Emergency circumstances mean circumstances in which the child is immediately threatened with harm." *Id.* (citing *Robison*, 821 F.2d at 922). "[T]he mere 'possibility' of danger" is not enough. *Id.* at 81. If it were, officers would always be justified in seizing a child without a court order whenever there was suspicion that the child might have been abused. *See id.* The law thus seeks to strike a balance among the rights and interests of parents, children, and the State. *See Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997); *Robison*, 821 F.2d at 920.

According to the district court, because consent was not obtained[9] and court proceedings not employed, "[t]he pivotal

[9] The defendants do not argue that the school's routine consent to Sarah's removal and, by implication, her later physical examination were effective as a substitute for parental consent. We do not think that they were. Although public school children have been said to be "committed to the temporary custody of the State as schoolmaster," *Vernonia Sch. Dist. 47J*

question" is whether James' removal of Sarah from P.S. 230 was an "appropriate response to a legitimately perceived emergency." *Tenenbaum I*, 862 F. Supp. at 970. The district court found that Williams, who ordered Sarah's removal, had probable cause, i.e., an objectively reasonable basis, to believe emergency circumstances existed because "the substance of what the child communicated to Murphy . . . is essentially uncontroverted, viz. that Sarah's father hurt her through contact with her vaginal area at night." *Id.* This was enough to satisfy the district court that as a matter of law there were emergency circumstances that permitted Sarah's removal from school for a physical examination without a court order. *See id.* at 971. We disagree.

While "there is a sufficient emergency to warrant officials' taking [a child into] custody without a prior hearing if [he or she] is immediately threatened with harm," *Robison*, 821 F.2d at 922 (citation omitted), the converse is also true. If the

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v. Acton, 515 U.S. 646, 654 (1995), the Supreme Court has rejected the notion that public schools generally "act *in loco parentis* in their dealings with students: [that] their authority is that of the parent . . . . Such reasoning is in tension with contemporary reality and the teachings of th[e] Court." *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985). If it were otherwise, a public school could in effect consent to its own infringements of students' Fourth and Fourteenth Amendment rights thereby rendering these rights meaningless as against the school. The Supreme Court has held to the contrary that a public school is an agency of the State subject to constitutional scrutiny when it performs a search with respect to a student. *See T.L.O.*, 469 U.S. at 336-37. The handing over of a child from a public school teacher to another State official, then, is not the equivalent of the consent of the parents. *See Gardiner v. Incorporated Village of Endicott*, 50 F.3d 151, 156 (2d Cir. 1995) ("The parties agree that in light of [a parent's] constitutionally protected liberty interest in the custody of her child, [the child] could not be removed from school by . . . police officers, absent a court order, an emergency, or parental consent.").

The extent to which a private person or institution with temporary caretaking responsibilities for a child may effectively consent to a government official's removal of the child and her subsequent physical examination is not in issue in this case. We intimate no views on the question.

danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, *ex parte* or otherwise,[10] for the child's removal, then the circumstances are not emergent; there is no reason to excuse the absence of the judiciary's participation in depriving the parents of the care, custody and management of their child. If, irrespective of whether there is time to obtain a court order, all interventions are effected on an "emergency" basis without judicial process, pre-seizure procedural due process for the parents and their child evaporates.

The decision to remove Sarah from school was made as early as Monday, January 8. She was not taken from school until Tuesday at noon. Defendants concede that a court order could have been obtained in one day. The evidence suggests that the purpose of removing Sarah from school was not to sweep Sarah out of harm's way but rather "to rule out [the possibility that Sarah had been] sexual[ly] abuse[d]." Based on those facts and the others recited in detail above, a properly instructed jury could conclude that at the time the caseworkers decided to remove Sarah, there was reasonably sufficient time, entirely consistent with Sarah's safety, to seek a court order. If there was reasonably sufficient time, there was no emergency. A jury could find that use of emergency, extra-judicial procedures was an infringement of the Tenenbaums' and Sarah's procedural due-process rights.

We reiterate the teaching of *Doe v. Connecticut Department of Child and Youth Services*, 911 F.2d 868 (2d Cir. 1990). The amount of time that elapsed between the report to the CWA, the caseworkers' visit to the Tenenbaum home, or James' visit to the school, on the one hand, and the removal of Sarah on the other, standing alone, proves nothing. If at

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[10] We thus do not hold, expressly or implicitly, as the dissent suggests, *see* dissent, *post*, at 7062 n.4, that notice to parent or guardian is constitutionally required.

any time Sarah should have been removed for her protection and there was not then reasonably sufficient time to seek pre-deprivation judicial authorization, there would have been, as a matter of law, no violation of either the Tenenbaums' or Sarah's due-process rights. A jury could conclude, however, that in the case of Sarah Tenenbaum that time never came.

When child abuse is asserted, the child's welfare predominates over other interests of her parents and the State. But "we must be sensitive to the fact that society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family." *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993). And while the paramount importance of the child's well-being can be effectuated only by rendering State officials secure in the knowledge that they can act quickly and decisively in urgent situations and that the law will protect them when they do, there is a critical difference between necessary latitude and infinite license. As the Supreme Court stated in *Stanley v. Illinois*:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.

405 U.S. at 656. And as this case may demonstrate, if officers of the State come to believe that they can never be questioned in a court of law for the manner in which they remove a child from her ordinary care, custody and management, it is inevitable that they will eventually inflict harm on the parents, the State, *and* the child.

2. *Qualified Immunity*

The determination that Sarah's removal may have been in violation of the Fourteenth Amendment does not end our inquiry with respect to the individual defendants. The district court held that even if an award of summary judgment to all the defendants was inappropriate "vis-a-vis Sarah's removal, the [individual defendants] would still be entitled to such relief under the doctrine of qualified immunity." *Tenenbaum I*, 862 F. Supp. at 972. We agree.

"The qualified immunity doctrine protects government officials from suits seeking to impose personal liability for money damages based on unsettled rights or on conduct that was not objectively unreasonable." *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998). Government officials "enjoy qualified immunity when they perform discretionary functions if either (1) their conduct did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable to believe that [their] acts did not violate these clearly established rights." *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998) (internal quotation marks and citations omitted) (alteration in original).

In January 1990, at the time the individual defendants took the actions questioned here, there was little established doctrine as to what steps State officials were constitutionally forbidden to take in seeking to protect children from alleged abuse. This Court recently had occasion to reflect on the dearth of explicit standards in this Circuit applicable to caseworker conduct during child abuse investigations. *See Wilkinson v. Russell*, 182 F.3d 89, 107 (2d Cir. 1999). None governed the circumstances of this case. To be sure, it was established as a general matter before the events in the instant case that "except where emergency circumstances

exist" a parent can "not be deprived" of the custody of his or her child "without due process, generally in the form of a predeprivation hearing." *Hurlman*, 927 F.2d at 79 (citing *Robison*, 821 F.2d at 921). But not until today have we specifically held that where there is reasonable time consistent with the safety of the child to obtain a judicial order, the "emergency" removal of a child is unwarranted. We cannot say that this principle was clearly enough articulated in or implied by our case law as of 1990 to require the defendants to answer in damages for their failure to abide by it at that time.

The district court, in a thoughtful and thorough opinion, moreover, held that the individual defendants' actions in removing Sarah *complied* with procedural due-process requirements. While such a conclusion would not entirely preclude us from finding that the individual defendants' actions violated plaintiffs' "clearly established right," the district court's determination in 1994 that no such right existed helps persuade us that in early 1990 the right was not "clearly established." We conclude that the district court correctly determined that the individual defendants were protected by qualified immunity.

Because we now hold that it is unconstitutional for state officials to effect a child's removal on an "emergency" basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety, caseworkers can no longer claim, as did the defendants here, that they are immune from liability for such actions because the law is not "clearly established." But there remains substantial protection for caseworkers under the second prong of the qualified immunity test, so long as it is "objectively reasonable [for them] to believe that [their] acts [do] not violate these clearly established rights." *Young*, 160 F.3d at 903. "The objective reasonableness test is met—and the defendant is entitled to

immunity—if 'officers of reasonable competence could disagree' on the legality of the defendant's actions." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). We continue to recognize such protection to be essential.

> [P]rotective services caseworkers [must] choose between difficult alternatives . . . . If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights. It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an objectively reasonable basis for their decision, whichever way they make it.

van Emrik, 911 F.2d at 866 (footnote omitted); *see also Defore v. Premore*, 86 F.3d 48, 50 (2d Cir. 1996) (emphasizing the importance of the qualified immunity defense to ensure publicly employed caseworkers the necessary latitude to exercise their professional judgment in matters related to child welfare). We are confident that the doctrine of qualified immunity applied in light of these principles will continue to provide ample protection for caseworkers, enabling them to fulfill their crucial duties safely and effectively. When sued, summary judgment will continue to be readily available to these caseworkers in proper cases under the qualified immunity doctrine.

3. *Liability of the City*

While the individual defendants are entitled to qualified immunity, the City is not. *See Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Ferran v. Town of Nassau*, 11 F.3d 21, 23 (2d Cir. 1993), *cert. denied*, 513 U.S. 1014 (1994). In

order for a court to impose liability on a municipal defendant under § 1983, the plaintiff must identify a municipal "policy" or "custom" from which the alleged injury arose. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978). This "ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 403-04 (1997).

The City conceded in the district court that both "the removal of Sarah and her subsequent examination" were accomplished pursuant to City policy. *Tenenbaum III*, at 2-3. This concession was reconfirmed at oral argument on this appeal. If this concession is binding on the City and after trial on remand Sarah's removal is found to have been a violation of the plaintiffs' procedural due-process rights, then the City will be liable for that violation. If for any reason the district court holds that the City is not bound by this concession, however, in order to prevail on their claim that the City is liable for the procedural due-process infringements by the individual defendants based on Sarah's removal, the plaintiffs will also be required to show on remand that the removal was effected pursuant to a City policy or custom.

B. *The Medical Examination*

1. *Constitutional Violation*

The district court found that Sarah's subjection to a medical examination by both a pediatrician and a gynecologist at the request of CWA caseworker James violated Sarah's and her parents' procedural due-process rights but concluded that the individual defendants were qualifiedly immune from liability. The City was not shielded from liability, however, because it conceded that the examination was conducted

pursuant to its policy. *Tenenbaum III*, at 2-3. On appeal, the City challenges the district court's determination that there was a due-process violation. The district court relied largely on *van Emrik v. Chemung County Department of Social Services*, 911 F.2d 863 (2d Cir. 1990), wnich held that in the circumstances presented by that case, a court order is constitutionally required before a child may be physically examined at the instance of the government for evidence of abuse. *Tenenbaum I*, 862 F. Supp. at 972-73. The City argues that the present case is distinguishable. We are unpersuaded.

In *van Emrik*, a seven-month-old child was taken by her mother to a hospital emergency room, where the infant was diagnosed with a spiral fracture of her right leg. The parents expressed their suspicion that the child's babysitter was responsible. The emergency-room physician reported the event to a child abuse "hotline." Its operators transmitted the report to officials at the Chemung County Department of Social Services. An investigation led to inconclusive results about the cause of the child's injury.

Before the child was discharged from the hospital, the caseworker-in-charge requested that the attending physician perform a series of long-bone x-rays. The doctor was hesitant to do so because of potential harm caused by radiation. When the caseworker stated that she wanted to see if the child had suffered other fractures that had gone undetected, however, the doctor complied. The parents were not consulted, their consent was not obtained, and no court authorization was sought or received. *See van Emrik*, 911 F.2d at 864-65. After the x-rays were taken, the child was placed in the temporary custody of the Department of Social Services; this custodial arrangement, effected pursuant to a court order, was not based on anything the x-rays revealed but rather was made because of the caseworkers' fear that the child could be in danger if returned home. The investigation ended without any

finding of responsibility for the injury and the child was returned to her parents. *See id.* at 865.

In determining that the administration of the x-rays without the parents' consent or a court order violated the plaintiffs' procedural due-process rights, this Court concluded that the x-rays were not "medically indicated." *See id.* at 867. The purpose of the x-rays "was not to provide medical treatment to the child, but to provide investigative assistance to the caseworker." *Id.* Based on this determination, we announced that

> the Constitution assures parents that, in the absence of parental consent, x-rays of their child may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances.

Id.

Relying on this holding, the court below found that:

> Sarah was subjected to intrusive bodily examinations by two strangers, in a strange location, in the absence of a parent or other reassuring figure . . . [and accordingly] plaintiffs have established, as a matter of law, that their procedural due process rights were violated by the manner in which Sarah was subjected to a medical examination on January 9, 1990.

Tenenbaum I, 862 F. Supp. at 973. The district court reiterated this holding on the City's motion for reconsideration. *See Tenenbaum II*, 907 F. Supp. at 617-18. The City contends that *van Emrik* is distinguishable from this case because (1) the medical procedure administered in *van Emrik* (long-bone

x-rays) was potentially harmful to the child, while the medical procedure in the present case was not, and (2) the x-rays in *van Emrik* were administered purely for investigative purposes whereas the examination of Sarah's vaginal area was conducted for the purpose of detecting and treating injuries that may have been caused by alleged sexual abuse. We disagree on both counts.

First, with respect to the contention that *van Emrik*'s holding does not apply because Sarah was subjected to a gynecological exam rather than long-bone x-rays, we agree with the district court that "[w]hile the child in *van Emrik* faced the possibility of physical injury, Sarah, almost certainly, did, in fact, experience psychological injury on January 9, 1990." 862 F. Supp. at 973. That likelihood surely could have been anticipated by both Williams and James. Moreover, *van Emrik* does not confine its holding to x-rays, but instead speaks in broad terms of "medical procedures in aid of child abuse investigations." *van Emrik*, 911 F.2d at 868.

Second, with respect to the City's argument that Sarah's physical examination was medically indicated, the evidence discloses that when Sarah was brought to the emergency room at Coney Island Hospital, doctors were told that she was a suspected victim of sexual abuse by her father. It is undisputed that the gynecological exam that ensued was undertaken for the purpose of determining whether such abuse had occurred. Williams unambiguously so testified. While the purpose was investigative, the method by which the doctors conducted the investigation was, of course, to examine Sarah for injuries consistent with abuse.

During the examination of Sarah "to rule out [the possibility of] sexual abuse," injuries might have been found, and if so we would surely expect them to have been treated. But that possibility did not turn an investigative examination into

one that is "medically indicated" and designed for treatment. *Cf. Chayo v. Kaladjian*, 844 F. Supp. 163, 169 (S.D.N.Y. 1994) (interpreting *van Emrik* to permit unauthorized x-rays that were ordered by a pediatric resident for purposes of diagnosis, not investigation, where child had visible bruise on head); *Schwimmer v. Kaladjian*, 988 F. Supp. 631, 641 (S.D.N.Y. 1997) (doctor-ordered x-rays where child was covered with ecchymotic lesions were medically indicated, not merely investigative), *aff'd*, 164 F.3d 619 (2d Cir. 1998) (unpublished table decision).

We also agree with the district court that if Sarah had ever been in imminent danger, she was not by the time she was taken to the hospital in the custody of the CWA. The caseworkers were required under *van Emrik* either to notify the Tenenbaums that Sarah was about to undergo a medical procedure and obtain the approval of either of them or to obtain judicial authorization. They did neither. *See Tenenbaum I*, 862 F. Supp. at 972.

2. *Qualified Immunity*

We also agree with the district court that the individual defendants were nonetheless entitled to qualified immunity. Not until *van Emrik* was decided in August 1990 was the law clear that subjecting a child to invasive investigatory medical examination in the course of an abuse investigation requires a court order absent parental consent. The events in *Tenenbaum* occurred more than seven months prior thereto. The individual defendants did not, therefore, violate rights that were "clearly established" at the time. *See* section I.A.2., *supra*.

II. Substantive Due-Process Claims

The Tenenbaums also contend that Sarah's temporary removal for the purpose of subjecting her to a medical exam-

ination violated their and Sarah's substantive due-process rights.[11] The district court granted the defendants' motion for summary judgment on this claim, finding that "defendants' deprivation of the Tenenbaums of their child for a single afternoon for a medical examination did not significantly infringe their fundamental right to live together without interference from the state." *Tenenbaum I*, 862 F. Supp. at 969. We agree with the district court's conclusion, although we affirm its grant of summary judgment as to the claim brought on Sarah's behalf on different grounds.

The Supreme Court has held that

> [w]here a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). "Substantive due process analysis is therefore inappropriate in this case . . . if [the] claim is 'covered by' the Fourth Amendment." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). As discussed below, Sarah's removal and her examination constituted a seizure and search, respectively, under the Fourth Amendment and the Tenenbaums have standing to assert a Fourth Amendment-based claim against the defendants on Sarah's behalf. Their claim on Sarah's behalf therefore "must be analyzed under the standard appropriate to [the Fourth Amendment], not under the rubric of substantive due process." *United States v.*

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[11] We do not read the Tenenbaums' complaint or their appeal papers to contend that the medical examination performed on Sarah itself violated the substantive rights afforded by the Due Process Clause and we therefore do not address that issue.

Lanier, 520 U.S. 259, 272 n.7 (1997). We affirm the dismissal of the substantive due-process claim brought on Sarah's behalf on this ground.

The Tenenbaums do not have—or at least no longer allege—cognizable Fourth Amendment claims based on Sarah's examination and removal. *See* note 13, *infra*. It is therefore appropriate to analyze whether their claims are redressible as substantive due-process violations. Because we find that they are not, we affirm the district court's grant of summary judgment on those claims.

The Tenenbaums and their family have, in general terms, a substantive right under the Due Process Clause "to remain together without the coercive interference of the awesome power of the state." *Duchesne*, 566 F.2d at 825. We could agree with the Tenenbaums that this right was violated by the defendants in this case only if we were to conclude that the removal of Sarah for several hours under these circumstances would have been prohibited by the Constitution even had the Tenenbaums been given all the *procedural* protections to which they were entitled. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986) (substantive due-process rights bar "certain government actions regardless of the fairness of the procedures used to implement them."). The substantive rights arising out of the Due Process Clause are not so broad.

"[T]he touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento*, 523 U.S. at 845 (internal quotation marks and citation omitted). Substantive due-process rights guard against the government's "exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 846 (citation omitted). "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' " and therefore unconstitutional.

Id. (citation omitted). There is no basis for us to hold that a temporary separation of Sarah from her parents in an effort to obtain assurance that she had not been abused would have been so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it even were it accompanied by full procedural protection. No judicial proceedings were in fact employed here, but that is relevant only to our conclusion that the Tenenbaums and Sarah may have been deprived of procedural due process, not to whether their substantive due-process rights were implicated.

Thus, in *Joyner v. Dumpson*, 712 F.2d 770 (2d Cir. 1983), we analyzed whether New York's mandatory custody transfer requirement as embodied in N.Y. Soc. Serv. Law §§ 358-a and 384-a violated plaintiffs' right to family integrity protected by substantive rights arising out of the Due Process Clause. In disagreeing with the district court's conclusion that it did, we emphasized that the custody transfer contemplated would not deprive parents completely of the right to rear their children. We stated that such a transfer "does not result in parents' wholesale relinquishment of their right to rear their children," because there the parents retained substantial responsibility for important decisions in their child's life. *Id.* at 778.

Here, Sarah was taken from P.S. 230 at about noon on January 9, 1990 and was returned to her parents hours later. The temporary separation of Sarah from her parents did not result in the Tenenbaums' wholesale relinquishment of their right to raise Sarah. The interference was not severe enough to constitute a violation of their substantive due-process rights.[12]

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[12] It is plain to us if not to the dissenting judge, *see* dissent, *post*, at 7066, that if the time for which a child is held is extended in order to permit resort to the courts, that extension of time will not convert the seizure from a lawful one to one that infringes the substantive due-process rights of the child or his or her parents.

The Tenenbaums aver that the duration of an imposed separation has no bearing on the substantive due-process analysis. The cases on which they rely, however, are inapposite. In *United States v. Langer*, 958 F.2d 522 (2d Cir. 1992), for example, we determined that police detention even for ten to fifteen minutes was "constitutionally significant" for purposes of 18 U.S.C. § 242. *See id.* at 524. The right implicated in *Langer* was the Fourth Amendment right to be free from unreasonable seizures and in that context we recognized that "even a brief seizure is a serious intrusion upon the sanctity of the person." *Id.* (internal quotation marks omitted). Similarly, in *Davis v. Mississippi*, 394 U.S. 721 (1969), the Supreme Court found that the detention of the defendant at police headquarters, even for a short period of time, violated the Fourth Amendment where there was no probable cause for arrest. The Tenenbaums ask us to extrapolate from *Langer* and *Davis* a rule that the separation of child and parent for a short period of time, no matter what procedural protections accompany it, constitutes a violation of the right to family integrity. There is no basis for us to do so. It does not follow from the principle that brief seizures of people may be unreasonable and therefore violate the Fourth Amendment that brief removals of children from their parents to protect them from abuse are "without any reasonable justification in the service of a legitimate governmental objective," *County of Sacramento*, 523 U.S. at 846, under the Due Process Clause. The district court properly granted summary judgment for all the defendants on this claim.

III. Fourth Amendment Claims

The Tenenbaums assert on behalf of Sarah[13] that both her removal and her subjection to the medical examination also

[13] "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United*

violated her right to be free from unlawful searches and seizures under the Fourth Amendment, because the CWA caseworkers did not have a warrant or its equivalent authorizing Sarah's removal and emergency circumstances did not exist at the time Sarah was removed. The district court's holding with respect to these claims mirrored its procedural due-process determinations: First, the caseworkers had probable cause to believe that Sarah was in imminent danger and so her emergency removal on January 9, 1990 did not violate the Fourth Amendment. Second, once Sarah was in the CWA's custody, the caseworkers could no longer have had immediate fears for her safety and there was therefore no emergency and no justification for her search, the judicially unauthorized investigative medical examination. As to both these claims, however, the court also determined that the individual defendants were shielded because "the application of the Fourth Amendment to child abuse investigations was insufficiently established at the time of defendants' investigation to overcome their defense of qualified immunity." *Tenenbaum I*, 862 F. Supp. at 978. The district court therefore granted summary judgment to all the defendants on the Fourth Amendment removal claim and to the individual defendants on the medical examination portion of that claim. The court found the City had conceded that the examination was conducted pursuant to City policy, *Tenenbaum III* at 2-3, and that it was therefore legally responsible for the individual defendants' actions with respect thereto. *Tenenbaum I*, 862 F. Supp. at 978.

States, 394 U.S. 165, 174 (1969). *But see J.B. v. Washington County*, 127 F.3d 919, 928 (10th Cir. 1997) (there may be circumstances in which a parent has Fourth Amendment standing to challenge the seizure of his or her minor child). The district court held that the Tenenbaums did not have standing to bring a Fourth Amendment claim in their own behalf with respect to the State's treatment of Sarah. We do not read their appeal papers to challenge this conclusion.

On appeal, the Tenenbaums assert on Sarah's behalf that contrary to the district court's holding, Sarah's removal, like her examination, was not justified by emergency circumstances and was therefore a violation of her Fourth Amendment rights. They also assert that the individual defendants are not entitled to qualified immunity. The City contends that the district court properly decided the removal aspect of the Tenenbaums' Fourth Amendment claim but that the medical examination portion also should have been dismissed because the examination was medically indicated and therefore constitutional. As with our determination of the procedural due-process claim, we find the record facts insufficient to sustain the district court's holding that as a matter of law Sarah's emergency removal was proper. But we agree with the district court that the individual defendants are entitled to qualified immunity. We also agree with the district court that the physical examination performed on Sarah without parental consent or judicial authorization violated Sarah's Fourth Amendment rights but that qualified immunity shields the individual defendants from liability on that claim as well.

A. *Sarah's Removal*

1. *Constitutional Violation*

Sarah was taken by a government official from her school to a hospital where she was required to remain for several hours before being examined and returned to her parents. We agree with the district court that this constituted a "seizure" under the Fourth Amendment. *Cf. Graham*, 490 U.S. at 395 n.10 ("A 'seizure', triggering the Fourth Amendment's protections occurs . . . when government actors have, 'by means of physical force or show of authority . . . in some way restrained the liberty of a citizen.' "); *Gardiner*, 50 F.3d at 155 (an individual is seized if, under the circumstances

presented, "a reasonable person would have believed he was not free to leave.") (internal quotation marks and citations omitted).

The Fourth Amendment protects "the people" from "unreasonable searches and seizures," also providing that "no Warrants shall issue, but *upon probable cause*, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized." (emphasis added).[14] In the context of a seizure of a child by the State during an abuse investigation, as the district court recognized, *see Tenenbaum I*, 862 F. Supp. at 974 n.7, a court order is the equivalent of a warrant. But the caseworkers here neither sought nor obtained such an order. So whether the equivalent of a warrant was properly obtained and, indeed, whether or in what sense probable cause would be required to be demonstrated in order to obtain one are not issues on this appeal.

The term "probable cause" has also been imported from the warrant clause of the Fourth Amendment and applied to its "unreasonable searches and seizures" clause. The term "probable cause" is thus not only the explicit Fourth Amendment requirement for obtaining a warrant, but also descriptive of what seizures are "reasonable" when, as here, no warrant has been obtained. *See generally*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

This issue arises most commonly where there is a warrantless arrest.

> In general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that

[14] The Fourth Amendment's search and seizure provisions are applicable to the defendants through the Fourteenth Amendment's Due Process Clause. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

the person to be arrested has committed or is committing a crime.

Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996) (citations omitted); *cf. T.L.O.*, 469 U.S. at 340 ("probable cause" that there has been a violation of the law is ordinarily required even for searches that can be permissibly carried out without a warrant). Probable cause is a flexible term. There is no "rigid demand that specific 'tests' be satisfied." *Illinois v. Gates*, 462 U.S. 213, 231 (1983). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* (internal quotation marks and citation omitted). The district court found that probable cause in this sense was required for the removal of Sarah from her school, and that it existed sufficiently to justify the defendants' actions. *Tenenbaum I*, 862 F. Supp. at 977.

There is a threshold issue, as the district court recognized. Does the ordinary probable-cause standard applicable to, among others, law enforcement officials making warrantless arrests also apply to caseworkers seizing children without prior court authorization? Although all agencies of government are governed by the unreasonable searches and seizures provision of the Fourth Amendment, there are some agencies outside the realm of criminal law enforcement where government officials have "special needs beyond the normal need for law enforcement [that] make the warrant and probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion) (internal quotation marks and citation omitted); *see also id.* at 732 (Scalia, *J.*, concurring). If forcing a non law-enforcement government officer to follow ordinary law-enforcement requirements under the Fourth Amendment would impose intolerable bur-

dens on the officer or the courts, would prevent the officer from taking necessary action, or tend to render such action ineffective, the government officer may be relieved of those requirements and subjected to less stringent reasonableness requirements instead. *See O'Connor*, 480 U.S. at 720; *see also, e.g., T.L.O.*, 469 U.S. at 340-43 (school administrator's search of a student's purse was not subject to the warrant and probable-cause requirements).

Case law in other circuits indicates that emergency removal of a child by caseworkers is not such a "special needs" situation. *See, e.g., Good v. Dauphin County Soc. Servs. for Children and Youth*, 891 F.2d 1087, 1092-94 (3d Cir. 1989) (applying ordinary probable-cause standard to inspection of child's nude body by caseworker and police officer); *Donald v. Polk County*, 836 F.2d 376, 384 (7th Cir. 1988) (applying probable-cause standard to caseworkers' removal of child from parents' custody). *But see Darryl H. v. Coler*, 801 F.2d 893, 901-02 (7th Cir. 1986) (neither warrant nor probable cause necessary for visual inspection of child's body for signs of abuse so long as relatively stringent state regulations were followed). As the district court noted, there is at least a hint in this Circuit, too, that probable cause is required of caseworkers seizing children without judicial authorization. *See Tenenbaum I*, 862 F. Supp. at 974 n.6 (*citing van Emrik*, 911 F.2d at 867 (Fourth Amendment concerns implicated because no "probable cause" for an arrest and no risk that child's condition would change during time required to obtain a court order); and *Doe v. Connecticut Dep't of Children and Youth Servs.*, 712 F. Supp. 277, 284 (D. Conn. 1989) ("The emergency removal of John Doe required 'probable cause' to believe that he was in immediate physical danger from his surroundings and that removal was necessary to insure his safety."), *aff'd*, 911 F.2d 868 (2d Cir. 1990)).

But we refrain from deciding categorically, as did the district court, that the removal of a child of whom abuse is suspected is not a "special needs" situation. There may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context.[15] This is not such a case.

First, if CWA caseworkers have "special needs," we do not think that freedom from ever having to obtain a predeprivation court order is among them. Caseworkers can effectively protect children without being excused from "*whenever practicable*, obtain[ing] advance judicial approval of searches and seizures." *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (emphasis added). As we observed in discussing procedural due process, judicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State. At the same time, it cannot be said that the requirement of obtaining the equivalent of a warrant where practicable imposes intolerable burdens on the government officer or the courts, would prevent such an officer from taking necessary action, or tend to render such action ineffective.

Second, in determining whether the CWA overstepped constitutional bounds in the case before us it does not matter whether we call the standard applicable to Sarah's seizure "probable cause," using ordinary search and seizure analysis, or refer directly to the "unreasonable . . . seizure" language of the Fourth Amendment, as we must in "special needs" circumstances. If "probable cause" was required, and the infor-

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[15] We thus need not decide, as the district court did, for example, whether caseworkers ever have "special needs" that would permit them to base a removal of a child on information from an anonymous source contrary to ordinary probable cause jurisprudence. *See Tenenbaum I*, 862 F. Supp. at 975-76.

mation possessed by Williams or James would have warranted a person of reasonable caution in the belief that Sarah was subject to the danger of abuse if not removed from school before court authorization could reasonably have been obtained, then they had probable cause to remove her without first obtaining a court order. *See Weyant*, 101 F.3d at 852. If a more general "special needs" "reasonableness" test applies, we nonetheless see no basis upon which to depart from the probable cause standard here. If the information possessed by Williams or James would have warranted a person of reasonable caution in the belief that Sarah was subject to the danger of abuse if not removed from school before court authorization could reasonably have been obtained, her removal was reasonable also.

Finally and in any event, it is core Fourth Amendment doctrine that a seizure without consent or a warrant is a "reasonable" seizure if it is justified by "exigent circumstances." *See, e.g., United States v. Karo*, 468 U.S. 705, 718 (1984); *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978); *United States v. Medina*, 944 F.2d 60, 68 (2d Cir. 1991), *cert. denied*, 503 U.S. 949 (1992); *Good*, 891 F.2d at 1093-94 (discussing "exigent circumstances" principles applied to officer's alleged strip search of child while seeking evidence of abuse). The justification for this exception to the warrant requirement as it pertains to law enforcement officials is "[t]he need to protect or preserve life or avoid serious injury." *Mincey*, 437 U.S. at 392 (citation omitted). Applied to child-abuse investigations, the exception similarly permits removal of a child where the state officers making the search or seizure "have reason to believe that life or limb is in immediate jeopardy." *Good*, 891 F.2d at 1094. We hold that where information possessed by a state officer would warrant a person of reasonable caution in the belief that a child is subject to the danger of abuse if not removed from school

before court authorization can reasonably be obtained, the "exigent circumstances" doctrine too permits removal of the child without a warrant equivalent and without parental consent. *See, e.g., Hurlman*, 927 F.2d at 80.

Whatever Fourth Amendment analysis is employed, then, it results in a test for present purposes similar to the procedural due-process standard. If information possessed by Williams or James warranted a person of reasonable caution in the belief that Sarah was subject to the danger of abuse if not removed from school before court authorization reasonably could be obtained, Sarah's removal complied with Fourth Amendment requirements despite the absence of a warrant equivalent because probable cause, reasonable cause, *and* exigent circumstances sufficient to justify it existed. A jury could reasonably conclude that the case here was otherwise. We reverse the district court's grant of summary judgment against Sarah on her Fourth Amendment removal claim.

2. *Qualified Immunity*

Qualified immunity protects the individual defendants from liability under the Fourth Amendment for Sarah's removal. The application of Fourth Amendment standards in the child-abuse context was not clear at the time of defendants' acts in 1990. Our analysis here is similar to our analysis of the individual defendants' immunity from the procedural due-process claims. *See* section I.A.2, *supra*. There was no "clearly established" law under the Fourth Amendment from which the individual defendants could have concluded that they did not have "probable cause" to remove Sarah from P.S. 230 on an emergency basis. In this analysis, as in the parallel due-process assessment, it is particularly difficult to conclude that the individual defendants' behavior was wrongful under "clearly established" Fourth Amend-

ment principles in light of the district court's carefully considered decision that it did not violate the Fourth Amendment at all, even though we ultimately disagree with that conclusion. We affirm the district court as to the individual defendants' qualified immunity.

We emphasize again the importance of the availability of qualified immunity where child welfare workers are seeking to protect children from abuse. If caseworkers " 'of reasonable competence could disagree' on the legality of [a] defendant's actions" their behavior is protected. *Lennon*, 66 F.3d at 420 (quoting *Malley*, 475 U.S. at 341).

3. *Liability of the City.*

For the reasons set forth in section I.A.3., above, in connection with liability for due-process violations, the City must be liable for Sarah's removal as a violation of her Fourth Amendment rights if the removal constituted such a violation and was effected in conformity with a "policy" or "custom" of the City. As we have indicated, the City apparently conceded the latter. *See Tenenbaum III*, at 2-3. If it has not, the Tenenbaums on Sarah's behalf will be required to establish both aspects of her Fourth Amendment removal case at trial.

B. *The Medical Examination*

1. *Constitutional Violation*

The district court found that Sarah's physical examination violated her Fourth Amendment right to be free from warrantless searches. *Tenenbaum I*, 862 F. Supp. at 978. The City was held liable for the actions of the individual defendants because it conceded that the examination was pursuant to City policy. *See Tenenbaum III*, at 2-3. We agree. For the reasons discussed in the procedural due-process portion of this

opinion, section I.B.1., *supra*, we conclude that the medical examination was "undertaken at the initiative of a state official [and] serve[d] primarily an investigative function; [and] in such circumstances, Fourth Amendment and bodily integrity interests of the child are implicated." *van Emrik*, 911 F.2d at 867; *see also Good*, 891 F.2d at 1092-93; *Darryl H.*, 801 F.2d at 907; *Schwimmer*, 988 F. Supp. at 644.

Further, as discussed in connection with the Fourth Amendment implications of Sarah's removal from school, we find that the Fourth Amendment's reasonable or probable cause and exigent circumstances doctrines apply to searches and seizures made in the course of child abuse investigations. Accordingly, in the absence of a warrant equivalent, in order for the examination to have been constitutional, reasonable or probable cause or exigent circumstances justifying an emergency examination must have existed at the time the examination was performed. As the district court found, they did not. Sarah could not have been in danger from her father while she was being held by the CWA. There was ample time to obtain a court order. The district court's conclusion that there was an insufficient justification for performing the examination on an emergency basis is not clearly erroneous and we therefore affirm its judgment as to this claim.

2. *Qualified Immunity*

Again, the individual defendants were rightly held by the district court to be immune. The only case that can be said to have "clearly established" the impropriety of Sarah's examination, albeit on due process not Fourth Amendment grounds, was *van Emrick*. It was not decided until months after the events in this case transpired. Whatever *van Emrik* "clearly established" therefore could not have guided the behavior of the individual defendants here and they are entitled to qualified immunity, as the district court held.

IV. Other Grounds for Appeal

A. *State-law Claims*

New York law provides absolute immunity for state and local employees when they perform discretionary, as opposed to ministerial, functions. *See, e.g., Tango v. Tulevech*, 61 N.Y.2d 34, 40 (1983). This protection extends to the state itself as well as its subdivisions. *See Arteaga v. State*, 72 N.Y.2d 212, 216 (1988). The district court dismissed the Tenenbaums' various state-law claims—all based on the CWA's removal and physical examination of Sarah—on the ground that James' and Williams' actions were discretionary and that absolute immunity was appropriate. *Tenenbaum I*, 862 F. Supp. at 981. We agree and affirm on this portion of the cross-appeal.

B. *Damages*

The Tenenbaums assert that the district court's award of $15,000 to Sarah and $1.00 each to Mr. and Mrs. Tenenbaum is inadequate compensation for the constitutional violations they suffered. The damage award was peculiarly within the discretion of the trial judge. *See Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1012 (2d Cir. 1995). His ability to judge the credibility of the witnesses and to assess based on their testimony the extent of their largely psychological injury cannot effectively be reviewed on appeal. *See United States v. Davis*, 967 F.2d 84, 86 (2d Cir.) ("trial court is in a unique position to evaluate witnesses' credibility."), *cert. denied*, 506 U.S. 928 (1992). We find nothing in the record to persuade us that the district court's findings in this regard were clearly erroneous. Of course the court may make an additional award should the Tenenbaums prevail on the claims that we remand for trial.

V. Claims Against the Board of Education

We make explicit what we think is implicit in the foregoing discussion. Public schools have a relationship with their students that is markedly different from the relationship between most governmental agencies, including the CWA, and the children with whom they deal. Constitutional claims based on searches or seizures by public school officials relating to public school students therefore call for an analysis under the Fourth and Fourteenth Amendments that is different from that set forth in this opinion. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (routine drug testing of public school student athletes does not violate the Fourth Amendment); *T.L.O.*, 469 U.S. 325 (1985) (Fourth Amendment "probable cause" requirement inapplicable to warrantless search by public school assistant vice principal of student's purse). Inasmuch as the plaintiffs have not pursued claims against the Board of Education or public school officials, we have no occasion to discuss this issue in further detail or to apply that analysis.

Conclusion

In sum, we find that, with respect to Sarah's removal from school by the CWA, the district court erred in concluding as a matter of law that the Tenenbaums' and Sarah's procedural due-process rights and Sarah's Fourth Amendment rights were not infringed as a matter of law, and remand those claims to the district court for further proceedings. We conclude, however, that (1) the district court was correct in deciding that the defendants did not violate the Tenenbaums' or Sarah's substantive due-process rights as a matter of law; (2) with respect to Sarah's physical examination, the district court was correct in deciding that the Tenenbaums' and Sarah's procedural due-process rights and Sarah's Fourth

Amendment rights were infringed; and (3) with respect to all the assertions of constitutional violations, the district court was correct in deciding that the individual defendants are entitled to qualified immunity. We also affirm the district court's assessment of damages with respect to Sarah's physical examination and its dismissal of the Tenenbaums' state-law claims.

JACOBS, *Circuit Judge*, concurring in part, and dissenting in part:

I concur generally in the portions of the majority opinion that affirm the dismissal of the Tenenbaums' substantive due process and state law claims. I respectfully dissent from the remainder of the opinion, however, because I see no constitutional violation, and would not reach the question of qualified immunity or the Tenenbaums' challenge to the district court's award of damages.

A. Removal of Sarah

1. Definition of "Emergency"

We have previously held that an emergency is an exigent situation in which a child welfare worker may take custody of a child without parental consent and *without a court order*. Thus the majority recites: "in 'emergency circumstances,' a child may be taken into custody by a responsible State official without court authorization or parental consent." *Majority Opinion* at 7027-7028 (quoting *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991)). This standard has been applied again and again. *See Gottlieb v. County of Orange*, 84 F.3d 511, 520 (2d Cir. 1996) ("It is established . . . that government

officials may remove a child from his or her parents' custody before a hearing is held where there is an objectively reasonable basis for believing that a threat to the child's health or safety is imminent."); *Cecere v. City of New York*, 967 F.2d 826, 829 (2d Cir. 1992); *Robison v. Via*, 821 F.2d 913, 922 (2d Cir. 1987) ("[I]t is sufficient if the officials have been presented with evidence of serious ongoing abuse and therefore have reason to fear imminent recurrence."); *Duchesne v. Sugarman*, 566 F.2d 817, 825-26 (2d Cir. 1977).

The majority opinion announces a new and incompatible principle: that there is no such emergency, notwithstanding the exigency, if there is or may be time to obtain a court order. None of our cases has held that the availability of the emergency-removal exception depends on whether there is time to obtain judicial pre-authorization. Each of our prior cases requires only that an emergency exist, a fact that is determined by reference to the child's peril, not the case worker's schedule or the court's calendar. This is a sensible formulation, and one that keeps the child welfare worker focused on what matters first in these cases, the child's precarious welfare. "When a child's safety is threatened, that is justification enough for action first and hearing afterward." *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983), *quoted in Robison*, 821 F.2d at 921.

The error of the majority opinion is to recast a child-welfare emergency in terms of a procedural emergency, *i.e.*, whether the danger to the child is so pressing that no court order is feasible. Thus the majority opinion requires a child welfare worker, at peril of personal liability, to make the additional determination as to whether there is time enough to secure court authorization. An already-difficult calculus is thus complicated by a new and confusing set of standards and risks. *Cf. Wilkinson v. Russell*, 182 F.3d 89, 105 (2d Cir. 1999) ("[C]ourts must be especially sensitive to the pres-

surized circumstances routinely confronting case workers, circumstances in which decisions between difficult alternatives often need to be made on the basis of limited or conflicting information." (internal quotation marks omitted)).

The circumstances of this case objectively justified invocation of the emergency exception. At the time the child welfare workers decided to effect the removal of Sarah Tenenbaum for a hospital exam, they knew: that the little girl was mute some or all of the time (a state consistent with some appalling trauma); that she had nevertheless expressed to her teacher that she was being hurt in her sexual parts by her father; that her mother worked nurse's hours; and that her father (whose hours as a Board of Education plumber were unknown) might or might not be home when she left kindergarten each day. I would therefore affirm summary judgment for the defendants on the removal claim.

2. *Applying the Majority's New Rule*

Under the rule announced by the majority, however, a jury would decide if there was time for the child welfare worker to obtain a court order. Was there time in this case? How long does it take? The City concedes that it can be done in a day: was there a day? The majority's treatment of these questions demonstrates that in terms of legal risk the only safe course now open for a social worker or the City will be to obtain a court order in every case. To illustrate: Supervisor Williams made the decision to remove Sarah for examination on Tuesday morning, January 9, and she was removed before the noon dismissal of her kindergarten class; yet the majority opinion holds that there was sufficient time to obtain a court order because the decision could have been made "as early as Monday," and a court order could have been procured in a day. *See Majority Opinion* at 7029.

The opportunity to seek a court order, as supposed in the majority opinion, is premised on the implied criticism that the decision to remove Sarah should have been made sooner or faster. Thus the majority criticizes Williams for awaiting a call from the Tenenbaums (a call the Tenenbaums aver they were never told to make), even after the record on which he acted was otherwise complete. But Supervisor Williams did not get the report on the interviews with Sarah and the teacher until after they were conducted sometime on Monday, and made his decision on Tuesday morning.[1]

There is therefore no basis for finding a delay of any appreciable number of workday hours. Similarly, the majority opinion criticizes inaction over the weekend, and suggests that efforts could have been made to find Sarah's teacher before Monday.[2] Thus in this case, where the child welfare workers acted with dispatch, having taken action no more than a few business hours after receipt of a full report, everyone involved has been criticized (and—but for immunity in this case only—made subject to liability) both for delay *and* for haste. That is why the only safe decision a child-welfare worker can make (from a liability standpoint) is to get a court order regardless of risk to the child.

The error of the majority opinion is partly traceable to the City's admission that it routinely effects emergency removals and rarely seeks judicial pre-authorization. Such a policy might be called into question in a case in which no objective

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1 The majority quotes testimony of caseworker James that Williams told her on Monday that she "would have to take [Sarah] to the hospital," and deduces from that testimony that Williams made the decision on Monday. But James' categorical testimony on this point establishes that she did not act on Monday because the decision could only be made by Williams, *i.e.*, the decision and order to act had not happened.

2 "Although the CWA maintains an emergency children's services unit that is on call nights and weekends, no one contacted it about the Tenenbaum situation." *Majority Opinion* at 7019.

emergency existed. But this is not such a case, nor is it a class action; the only issue before the Court is whether the child welfare workers were justified in bypassing judicial pre-authorization *in their removal of Sarah Tenenbaum*, which in my view they clearly were. Whether they acted pursuant to a city policy bears on whether there would have been municipal liability if the defendants had committed a constitutional violation, *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978), not on whether there was a constitutional violation in the first place.

The majority opinion, however, treats the City's policy as circumstantial evidence from which a jury could infer a lack of emergency in this case, *i.e.*, that the decision to remove Sarah was triggered by compliance with the City's policy rather than by the judgment of the child welfare workers.

As the majority opinion thus demonstrates, the new constitutional standard—and therefore the liability of case workers and municipalities—depends upon a highly subjective determination as to whether there is time to get a court order, a question that is more complicated than it seems. The majority opinion holds that a decision made on Tuesday morning, and acted upon a couple of business hours later, is unconstitutional because a court order could have been obtained if (as the majority thinks) the information available on Monday afternoon was enough. Such second-guessing places in jeopardy the case worker or supervisor who does the more thorough investigation, thinks a bit longer before acting, or does something Tuesday morning that could have been done on Monday afternoon. This kind of analysis draws the federal court into decisions about bureaucratic practice and technique, and into the tough choices that caseworkers must make and that we should not.

The addition of this subjective element is contrary to this Court's precedents, all of which have assessed due process challenges to emergency removals in terms that are strictly objective. *See, e.g., Wilkinson*, 182 F.3d at 104 ("An investigation passes constitutional muster provided simply that case workers have a *reasonable basis* for their findings of abuse." (internal quotation marks omitted) (emphasis added)); *Gottlieb*, 84 F.3d at 520 ("It is established . . . that government officials may remove a child from his or her parents' custody before a hearing is held where there is an *objectively reasonable basis* for believing that a threat to the child's health or safety is imminent." (emphasis added)); *Cecere*, 967 F.2d at 829 ("[T]he only issue before us is whether the assertion of custodial authority by [the defendant] was *objectively reasonable*." (emphasis added)); *Robison*, 821 F.2d at 922 ("The belief that the danger was of emergency proportions was likewise *objectively reasonable*." (emphasis added)); *see Chayo v. Kaladjian*, 844 F. Supp. 163, 169 (S.D.N.Y. 1994) ("[I]t is this Court's task to focus on the objective legal reasonableness of the defendants' actions, rather than the defendants' subjective state of mind." (internal quotation marks and citation omitted)).[3]

3. The Danger of the Majority's New Rule

One harm of the majority opinion will be to make summary judgment largely unattainable in due process and Fourth Amendment cases brought by parents challenging emergency removals. Ordinarily, a judge would have little trouble ascertaining as a matter of law that the child welfare worker faced an emergency, objectively considered. (This case, in my

[3] Some of these cases addressed qualified immunity, rather than the underlying constitutional claim. As we have recently noted, however, the cases in this area typically collapse the two inquiries, so the qualified immunity cases are directly relevant to this discussion. *See Wilkinson*, 182 F.2d at 107 & n.10.

view, is one of them.) But it will be all too easy for a plaintiff to point to some circumstance from which a jury could infer that the decision to intervene could have been made sufficiently in advance of the time it was made to allow the case worker to get a court order. Delay will not be hard to find: child welfare officers often must practice triage, deciding which endangered child must wait while another one, in seemingly greater peril, takes precedence. Decisions on emergencies are delayed, reviewed and reconsidered, or stuck in a superior's in-box. And even a child welfare worker overburdened with real emergencies is a human being who might go to lunch, take a personal day, go home on time, or spend weekends at home.

If the delays that inhere in any bureaucracy are sufficient to raise a material question as to whether the exigency foreclosed the seeking of a court order, then nearly every such case will have to be tried to a jury. And individual child welfare workers, whose qualified immunity defense in such cases has now become tenuous, could be individually liable for damages. The only safe harbor for child welfare workers in such a legal environment will be to seek and then await a court order in every instance, with the result that some children will be left too long in abusive situations.

My principal concern is that the majority's approach, so measured and reasonable in the pages of a federal appellate opinion, will work serious harm in an exceptionally sensitive area of state responsibility. "[C]onsiderable deference must be accorded the delicate judgments made by responsible state officials. Perhaps in no context is this truer than where the state is acting as *parens patriae* to protect children from imminent danger." *Jordan v. Jackson*, 15 F.3d 333, 348 (4th Cir. 1994); *see also Wilkinson*, 182 F.3d at 104 (discussing the "compelling governmental interest in the protection of minor children, particularly in circumstances where the

protection is considered necessary as against the parents themselves" (internal quotation marks omitted)). The job of the child welfare worker requires a delicate balancing of risks. Already, there are incentives to err on the side of excessive caution rather than excessive action. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 74-78 (1998). The majority opinion reinforces that tendency, which will be bad news for abused children.

Although the majority opinion finds that the individual defendants in this case are qualifiedly immune from damages, the issuance of the holding in this appeal means (*inter alia*) that qualified immunity in similar situations may no longer be available in this Circuit. Every time a child welfare worker has reason to suspect child abuse, she will have to consider (i) whether there is reason to believe the child is in imminent danger (which until now has been all that was required) *and* (ii) whether there is time to get to court and obtain a court order (the majority's new requirement) *as well as* (iii) whether a court or jury will second-guess that decision on the basis that more efficient decision-making would have afforded sufficient time to obtain the court order. In terms of litigation, individual liability and damages, an error on the side of removal is risky, while an error on the other side is safe. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201-02, 109 S. Ct. 998, 1006-07 (1989) (no § 1983 liability for state defendants' failure to remove child from abusive situation). The incentive will be to allow some number of children—their constitutional rights preserved—to return home to a predatory adult.[4]

[4] Another passage in the majority opinion also has this unintended effect of increasing the risks of child abuse. The majority opinion strongly implies that the defendants in this case should have complied with New York's statute governing "preliminary" removal orders. *See Majority Opinion* at 7021-7022 & n.6 (citing N.Y. Fam. Ct. Act § 1022). Although such

B. Physical Examination of Sarah

The majority is on stronger precedential ground in sections I.B. and III.B., which address the physical examination of Sarah. It concludes that the examination was investigative in the police sense, rather than medically indicated, and therefore inappropriate without parental consent or judicial preauthorization.

The principal authority in this Circuit on the question of medical examinations during the course of child abuse investigations is *van Emrik v. Chemung County Department of Social Services*, 911 F.2d 863 (2d Cir. 1990). In that case, two parents took their small child to the hospital, where a leg fracture was diagnosed. *See id.* at 864. Suspicious that the baby-sitter had caused the injury, the parents agreed with hospital personnel that the case should be reported to the state's child abuse "hot line." *See id.* at 864-65.

When the child was about to be discharged, the assigned case worker asked the attending physician to perform "long-bone x-rays." *Id.* at 865. The doctor demurred because of the

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an order can be obtained *ex parte*, the officer seeking it must make a notice showing, *i.e.*, either that "the parent or other person legally responsible" for the child is "absent" or that the parent refused to consent to the child's temporary removal. *See* N.Y. Fam. Ct. Act § 1022(a); *see also id.* § 1023; *In re Adrian J.*, 119 Misc.2d 900, 464 N.Y.S.2d 631, 633 (Fam. Ct. 1983) (finding § 1022 order "jurisdictionally defective" and therefore a "nullity" when child protection workers "failed to ask [parents] to consent to a temporary removal of the child").

The majority opinion thus has the effect of imposing a constitutional requirement of parental notice. It is worth pointing out that while the child welfare worker is seeking the order, the child will presumably remain in the custody of the alleged abuser, who is thereby alerted to the accusation and has time to coach the child, or take other measures. I cannot agree that the Constitution requires resort to the New York statute even when a child is in objective danger of harm. *Cf. Robison*, 821 F.2d at 923 ("Federal constitutional standards rather than state statutes define the requirements of procedural due process.").

radiation risk, and so advised the case worker. *See id.* The case worker prevailed on the doctor, however, insisting that she needed "to know if there were other fractures that had gone undetected and had healed." *Id.*

In a fact-specific opinion, the *van Emrik* court emphasized that the x-rays in that case "were not medically indicated" and that the doctor had initially opposed them. *Id.* at 867. "The x-rays were not sought to facilitate diagnosis or treatment . . . . but to provide investigative assistance to the caseworker." *Id.* The court concluded that parents' liberty interest in the "care, custody, and management of their child" was especially "significant" when an examination "serve[s] primarily an investigative function." *Id.* In such cases, the Court held, it is improper to perform the examination without a judicial finding of justification and reasonableness.

The district court here found that "the gynecological examination of Sarah—like the examination of the child in *van Emrik*—was not conducted 'to provide medical treatment to the child, but to provide investigative assistance to the caseworker.' " *Tenenbaum v. Williams*, 907 F. Supp. 606, 618 (E.D.N.Y. 1995) (quoting *van Emrik*, 911 F.2d at 867). The sole evidence on this point is the testimony of defendant Nat Williams to the effect that Sarah was examined to detect sexual abuse. The district court construed this testimony (which is set out in the margin[5]) as a *concession* that the examination

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5 * "[M]y decision was that [Sarah] should be removed from the school and taken to Coney Island Hospital, specifically to be examined to rule out sexual abuse."

* "Q: [Y]ou removed or had Sarah removed because you wanted to have a medical examination done to determine whether or not she had been sexually abused; is that correct?
A: That is correct."

* "I was doing [the exam] to determine whether or not the child had been sexually abused."

was "purely investigatory," as *van Emrik* used that term. The district court thus read the word "investigatory" as a term of art suggesting (to lawyers) a police or criminal investigation. However, the district court (as well as the majority opinion) fail to appreciate that *medical diagnostics* is also "investigatory"—in the sense that the physician investigates whether the patient would benefit from treatment.

In *van Emrick*, there was no question that the examination was conducted exclusively to further the forensic investigation: the case worker was seeking evidence of *healed* fractures, and the procedure was medically harmful (in the doctor's view). The holding of *van Emrik* therefore extends no further than instances in which medical justification is lacking. The case should not be read to bar physical examinations that serve a medical purpose, even if a law enforcement purpose is served as well.

No doubt, the physical examination of Sarah Tenenbaum had its forensic uses. But it was also investigatory in the additional sense that signs of sexual abuse would have served important diagnostic purposes: a five-year-old girl who has been sexually abused by an adult male (a) may need immediate medical care; and (b) may need to be kept out of an environment in which she would be exposed to further medical and psychological injury.

These cases being necessarily quite fact-specific I believe that, notwithstanding the holding in this case, the door stands open for the City to prove in other cases, or after adoption of new guidelines, that the investigatory purpose of the *Tenenbaum*-style examination is chiefly diagnostic, and designed to ascertain whether the child is in need of medical treatment and protection from further injury.

The majority notes that "if Sarah had ever been in imminent danger," she was no longer in danger while in the cus-

tody of the child welfare workers. They therefore had time to seek judicial authorization for the examination. *See Majority Opinion* at 7038-7039, 7051. Of course, in another portion of the opinion (in which I concur), we affirm dismissal of the plaintiffs' substantive due process claim on the ground that the "temporary separation" of Sarah and her parents "was not severe enough" to constitute a violation of substantive due process. *See Majority Opinion* at 7042. These two rulings will create a dilemma for the child welfare worker who has removed a child and sees a need for a medical examination. She might await judicial authorization, which may require overnight detention, with concomitant delays sufficient to support a substantive due process claim. Or she might go ahead with the examination, in order to return the child home as soon as possible, and run the risk of procedural due process and Fourth Amendment liability.

* * *

The influence of this opinion is potentially far-reaching. The Court creates a new procedural requirement that burdens, punishes, and thereby marginally inhibits decisive action to protect children from people in their households.

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Marc TENENBAUM and Mary Tenenbaum, individually and on behalf of Sarah Tenenbaum, an infant, Plaintiffs,

v.

Nat WILLIAMS, individually and as caseworker, Child Welfare Administration, Veronica James, individually and as caseworker, Child Welfare Administration, Doby Flowers, individually, Marva Livingston Hammons,* as Commissioner of Social Services of the City of New York, Brooke Trent, individually, Claude Meyers,* as Deputy Commissioner of Social Services of the City of New York, City of New York, and New York City Board of Education, Defendants.

No. 91-CV-0037 (DRH)

United States District Court,
E.D. New York,
Hauppauge Division.

862 F. Supp. 962; 1994 U.S. Dist. LEXIS 14320

Sept. 30, 1994

Lansner & Kubitschek by Carolyn A. Kubitschek and David J. Lansner, New York City, for Plaintiffs.

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* Defendants Hammons and Meyers have replaced defendants Flowers and Trent as Commissioner and Deputy Commissioner of Social Services of the City of New York. Accordingly, while Flowers and Trent remain defendants in their individual capacities, Hammons and Meyers are, hereby, substituted as defendants with respect to plaintiffs' claims against Flowers and Trent in their official capacities. Fed. R. Civ. P. 25(d)(1). See Hafer v. Melo, 502 U.S. 21 (1991).

Paul A. Crotty, New York City Corporation Counsel by Bruce Rosenbaum, New York City, for Defendants.

MEMORANDUM AND ORDER

HURLEY, District Judge

Defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56(b); plaintiffs cross-move for partial summary judgment pursuant to Federal Rule of Civil Procedure 56(a).

Defendants' motion is denied in part and granted in part; plaintiffs' cross-motion is denied.

BACKGROUND

In September 1989, plaintiffs Marc and Mary Tenenbaum ("the Tenenbaums") enrolled their daughter Sarah in kindergarten at P.S. 230 in Brooklyn. Sarah suffers from "elective mutism," meaning that she does not speak to people outside of her home.

At P.S. 230, Sarah often fell asleep and on occasion would cry in the morning in class, according to her teacher, Mary Murphy. (Murphy Dep. at 17-18.) At first, Sarah did not speak to Murphy. Over time, however, Sarah grew comfortable with her, and would show Murphy pictures and speak one- or two-word sentences to her. (Murphy Dep. at 21.)

On January 4, 1990 and January 5, 1990, defendants allege that Sarah communicated to Murphy in words and gestures that her father sexually abused her. On one occasion when Sarah began crying, Murphy asked her if anyone was hurting her and identified a series of people in

her life to which she "shook her head no." However, when her father's name was mentioned in the litany of individuals, Sarah's eyes filled "up in tears and she shook her head, yes, and she started to really cry." (Murphy Dep. at 23.) Sarah is said to have pointed to the groin area of one of the dolls in the play area of her classroom when asked by Murphy where her father hurt her. (Murphy Dep. at 24-26.) Defendants also allege, *inter alia*, that Sarah drew a picture of two figures and said to Murphy that one of the figures was her father and that he "kneeled" and "hurt" her, and that she was the other figure, and then she stopped talking. (Murphy Dep. at 27.)

As required by Sections 413 and 415 of the New York Social Services Law, Murphy reported what Sarah had done and said to her superiors at P.S. 230. An official at the school, Susan Raiten, in turn reported the matter to the New York State Department of Social Services' ("the State DSS's") Central Register of Child Abuse and Maltreatment by telephone in the morning of Friday, January 5, 1990. (Raiten Dep. at 13.) An operator at the State DSS recorded the call on a DSS Form 2221 ("2221 Report"). The 2221 Report stated, "Sarah is speech and language delayed. Sarah is unable to stay awake during the day. Ch[ild] often naps off and on all day. Ch[ild] is nervous and withdrawn. Ch[ild] is afraid of fa[ther]. Fa[ther] hurts her vaginal area at night."

As required by state law, the State DSS forwarded the 2221 Report to defendant Nat Williams, a supervisor in the child protective unit of the New York City Child Welfare Administration ("the CWA") Brooklyn field office. Williams received the report on the day it was made, Friday, January 5, 1990, and on the same day assigned the case to defendant Veronica James, a newly-hired caseworker under his supervision. (Williams Dep. at 37.)

Williams instructed James to contact Murphy to verify the allegations contained in the 2221 Report. He also told James to visit the Tenenbaums' home. James attempted to contact Murphy later on Friday, but she had already left for the day. James then visited the Tenenbaum home with a co-worker named Thomas O'Connell.

When the caseworkers arrived at the Tenenbaum home on Friday evening, they told the Tenenbaums that they were there to investigate a report that Sarah had been absent from school and was developmentally delayed. (James Dep. at 11.) They did not inform the Tenenbaums of their suspicion of sexual abuse. (Mary Tenenbaum Decl. at ¶ 13.) James and O'Connell interviewed the Tenenbaums at length (Mary Tenenbaum Decl. at ¶ 15), and the Tenenbaums informed the caseworkers that Sarah was being treated at Maimonides Hospital for her speech and developmental problems. The Tenenbaums gave James the names of the pediatricians caring for Sarah and her younger brother, Aaron, and signed releases for their medical records. (James Dep. at 16.) They also informed the caseworkers that they had an ongoing dispute with officials at P.S. 230 over plans for Sarah's education, and believed that the report of Sarah's absence and developmental problems was made to retaliate for their refusal to go along with the school's plans. (*Id.* at 11; Mary Tenenbaum Decl. at ¶P 14.) The Tenenbaums partially undressed their children so that James and O'Connell could inspect them for any bruises or marks on their chests, backs or extremities. The caseworkers found no signs of maltreatment or abuse. (James Dep. at 14-15; O'Connell Dep. at 18.) No effort was made to inspect either child's genital area.

No further action on the Tenenbaum case was taken over the weekend. On Monday, January 8, 1990, James visited P.S. 230 to interview Murphy and Sarah. Murphy related the evidence of abuse she had gathered from Sarah on January 4, 1990 and January 5, 1990. When Murphy, with James present, asked Sarah whether her father touched her near her vagina and hurt her, however, Sarah shook her head "no." (James Dep. at 22-25.) In fact, she responded to all of the questions asked of her that day by Murphy by shaking her head "no," including the question "[d]oes your mother bathe you." *Id.* Murphy also reported to James that a gym teacher had noticed a red mark on Sarah's thigh several weeks earlier. (Murphy Dep. at 36.) The Tenenbaums allege that the gym teacher could have seen the mark only by undressing Sarah because she always wore opaque tights to school. (Mary Tenenbaum Decl. at ¶ 21.)

After leaving the school, James reported what she had learned to Williams. He instructed her to go to P.S. 230, to effect an emergency removal of Sarah pursuant to Social Services Law § 417 and Family Court Act § 1024, and to take her to Coney Island Hospital to be examined by doctors for possible sexual abuse. (James Dep. at 28.)

James and Williams made no effort to seek judicial authorization prior to removing Sarah, although Williams testified that a court order can be obtained within one day. (Williams Dep. at 128.)

In the afternoon of Tuesday, January 9, 1990, James visited P.S. 230 and gave the school officials a form which indicated that she was taking Sarah into protective custody in accordance with state law. (Oberferst Dep. at 39.) James then took Sarah to Coney Island Hospital.

At the hospital, a pediatrician and a gynecologist conducted an examination of Sarah. The doctors found no evidence of sexual abuse.

While James and Sarah were at Coney Island Hospital, Williams contacted Mary Tenenbaum by phone to advise her that the CWA had removed her daughter from school. Mary Tenenbaum contacted her husband and went to meet with Williams at his office. Marc Tenenbaum arrived later. The Tenenbaums assert that Williams spoke very rudely to them. He allegedly warned them that they would not get Sarah back, that Mary Tenenbaum was an unfit mother, and that Marc Tenenbaum was a sex abuser. (Mary Tenenbaum Decl. at ¶¶ 28-29.)

At the conclusion of Sarah's examination at Coney Island Hospital, James took her to the CWA's Brooklyn field office, where Sarah met her parents at about 7:30 to 8:30 p.m. (Mary Tenenbaum Decl. at ¶ 32.)

Later that evening, Williams told the Tenenbaums that the CWA would not file charges and that they could take Sarah home because the medical examination did not find evidence that the child had been sexually abused. (Mary Tenenbaum Dep. at 241.)

Ultimately, Williams marked the case "unfounded," (Williams Dep. at 100), and no attempt to remove Saran from the Tenenbaum home was made.

DISCUSSION

I. Standard for Summary Judgment

A party should be granted summary judgment only when its moving papers show that "there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing the absence of relevant facts in dispute, and the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 57 (2d Cir. 1987). In addition, "not only must there be no genuine issue as to evidentiary facts, but there must also be no controversy regarding the inferences to be drawn from them." *Id.*

Plaintiffs correctly argue that a court generally should not render summary judgment prior to the completion of discovery. Fed. R. Civ. P. 56(f); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). By order, dated November 1, 1991, Hon. Carol Bagley Amon of this Court issued an order "staying discovery as to *Monell* claims against the City of New York and the New York Board of Education" until completion of the non-*Monell* discovery, at which time permission could be sought to lift the discovery stay as to the remaining claims. As a result, the defendants Flowers, Trent, Hammons, Meyers, and the City of New York have not been deposed or otherwise subject to discovery. Therefore, as to those defendants, the issue of summary judgment will be held in abeyance pending the completion of discovery, unless plaintiffs' claims against one or more of them are clearly ripe for summary judgment now and *Monell*-type discovery could not affect the ultimate outcome.

II. Elements of Claims Under Section 1983

The Tenenbaums seek damages pursuant to 42 U.S.C. § 1983. To recover, they must show (1) "that some person has deprived [them] of a federal right" and (2) "that the person who has deprived [them] of that right acted under

color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980). To recover against employees of the City of New York in their individual capacities, plaintiffs must also be prepared to resist the asserted affirmative defenses of qualified immunity. *Id.*

Qualified Immunity

The individual defendants James, Williams, Flowers and Trent will be entitled to immunity if they can show that (1) "it was not clear at the time of the official acts that the interest asserted by the plaintiff was protected by a federal statute or the Constitution," or (2) "it was not clear at the time of the acts at issue that an exception did not permit those acts," or (3) "even if the contours of the plaintiffs' federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant[s] may [still] enjoy qualified immunity if it was objectively reasonable for [them] to believe that [their] acts did not violate those rights." *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987). As to this third prong, courts have explained that a defendant is entitled to summary judgment if the defendant "'adduce[s] sufficient facts [such] that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendant []' to believe that he was acting in a fashion that did not clearly violate an established federally protected right." 821 F.2d at 921 (quoting *Halperin v. Kissinger*, 807 F.2d 180, 189 (D.C. Cir. 1986)).

Supervisor Liability

Plaintiffs assert individual claims against Doby Flowers and Brooke Trent, the former Commissioner and former

Deputy Commissioner, respectively, of the Department of Social Services of the City of New York. As individuals, Flowers and Trent can be liable only if they were personally responsible for violations of plaintiffs' rights, by, inter alia, promulgating unconstitutional policies or plans, or otherwise authorizing or approving the challenged misconduct. See *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 371, 46 L. Ed. 2d 561 (1976) (superior can be liable for constitutional violation resulting from policy or order); *Duchesne v. Sugarman*, 566 F.2d 817, 831 (2d Cir. 1977) (superiors could be liable for policy-making); *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989) (supervisor liable when he or she has actual or constructive notice of an unconstitutional practice and demonstrates "gross negligence or deliberate indifference" by failing to act).

Municipal Liability

Plaintiffs also assert claims against the City of New York, Marva Livingston Hammons and Claude Meyers[1] in their official capacities, as the Commissioner, and Deputy Commissioner of New City Social Services respectively, and against the New York City Board of Education. The claims against Hammons and Meyers, as well as the claims against James and Williams in their official capacities as caseworkers, are the equivalent of claims against New York City. *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 361-62, 116 L. Ed. 2d 301 (1991). The Tenenbaums could recover against New York City or the Board of Education based on their authorization of unconstitutional acts, approval of unconstitutional customs, or failure to train. *See*

[1] As noted previously, Hammons and Meyers replaced Flowers and Trent as Commissioner and Deputy Commissioner of Social Services of the City of New York after the present action was commenced.

Monell v. Department of Social Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (city can be liable for unconstitutional policy promulgated by its officers); *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (complaint asserting failure to train as a result of deliberate indifference to constitutional rights states a claim for relief). While the city and its agencies cannot be held liable based on *respondeat superior*, *Monell*, 436 U.S. at 694 n.58, they are not permitted to assert the defense of qualified immunity that is available to the individual defendants. *Smith v. Wade*, 461 U.S. 30, 32-33, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983).

III. Due Process Claims

A. Substantive Due Process

The Tenenbaums first argue that defendants' removal of their daughter from school to be examined for abuse violated their Fourteenth Amendment right to substantive due process.

Plaintiffs' substantive due process claim derives from "the right of the family to remain together without the coercive interference of the awesome power of the state." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). This right is fundamental. *Joyner v. Dumpson*, 712 F.2d 770, 778 (2d Cir. 1983).

Although fundamental, a constitutional violation of the right to family integrity occurs only if defendants' actions "significantly interfere" with plaintiffs' family integrity. *Zablocki v. Redhail*, 434 U.S. 374, 386, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978). For example, in *Joyner*, the Second Circuit found that a statute which required that parents wishing to obtain state-subsidized residential care for their

children temporarily transfer custody to the state did not significantly interfere with the parents' right to family integrity. 712 F.2d at 778.

Similarly, in *Fitzgerald v. Williams*, 787 F.2d 403, 408 (8th Cir. 1986), the Eighth Circuit held that no substantive due process violation occurred where caseworkers had arranged for a psychologist to examine a child who was allegedly abused. *See also Doe "A" v. Special School Dist.*, 637 F. Supp. 1138, 1146 (E.D. Mo. 1986) (detention by bus driver for several hours did not infringe right to family integrity).

As in *Joyner*, *Fitzgerald* and *Doe "A"*, defendants' deprivation of the Tenenbaums of their child for a single afternoon for a medical examination did not significantly infringe their fundamental right to live together without interference from the state.

All defendants are therefore entitled to summary judgment on this claim.

B. Procedural Due Process

1. Removal of the Child from School

The Tenenbaums also allege that defendants deprived them of their right to procedural due process. In *Robison v. Via*, the Second Circuit held that

> it [is] clearly established that a parent's interest in the custody of his or her children [is] a constitutionally protected "liberty" of which he or she [can] not be deprived without due process, which [] generally require[s] a predeprivation hearing. However, it [is] equally well established that officials may temporarily

> deprive a parent of custody in "emergency" circumstances "without parental consent or a *prior* court order."

821 F.2d 913, 921 (2d Cir. 1987) (emphasis in original) (citations omitted).

In the present case, James and Williams relied on Section 1024 of the New York Family Court Act in removing Sarah from school on January 9, 1990. That Section provides that a child may be removed, absent parental consent or a court order, if there is "reasonable cause to believe that the child is in such circumstances or condition that his continuing in said place of residence or in the care and custody of the parent . . . presents an imminent danger to the child's life or health," and there is insufficient time to obtain prior judicial authorization for the removal pursuant to Section 1022 of the Family Court Act.[2]

Plaintiffs claim defendants violated state law in removing Sarah. Given the chronology in this case, it may be that James and Williams had sufficient time to obtain a Section 1022 court order. Such an order, according to Williams, could have been obtained within one day. (Williams Dep. at 128.) However, whether the procedure embodied in Sections 1022, or 1024, or another Section of the Family Court Act should have been followed by CWA has little, if any, bearing on the issue before the court. As noted by now Chief Judge Newman, writing for the Second Circuit in *Doe v. Connecticut Dep't of Children and Youth Servs.*:

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[2] Section 1022 provides that a family court judge may issue an order directing the temporary removal of a child from his or her home, before a child abuse or neglect petition is filed, upon a finding that an emergency exists.

> Appellants challenge Judge Dorsey's conclusion . . . [in granting summary judgment to defendants, upon the ground] that factual issues remain as to whether the defendants fully complied with the requirements of state law. Even if true, the claim is irrelevant. The question is whether 'no reasonable jury, looking at the evidence most favorable to, the plaintiffs could conclude that it was objectively unreasonable for the defendant[s]' to believe that [they were] acting in a fashion that did not clearly violate an established *federally* protected right.

911 F.2d 868, 869 (2d Cir. 1990) (emphasis in original).

The pivotal question, then, is whether Sarah's removal was justified as an appropriate response to a legitimately perceived emergency. If so, neither parental consent nor prior judicial approval was required. The meaning of the word "emergency" in the present context is explained in *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991) thusly:

> the child is immediately threatened with harm, . . . for example . . . where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence . . . .

A juxtapositioning of the *Hurlman* standard with the specific information that Sarah communicated to her teacher, and which the teacher reiterated to James, indicates that an emergency existed, even if the child's claimed recantation before James is taken into account. A CWA worker, in possession of the above information, would have reasonable cause to conclude that Sarah had been a victim of sexual abuse by her father, and that returning the child to her home would place her at imminent risk for further abuse. *See, e.g., Cecere v. City of New York*, 967 F.2d 826,

830 (2d Cir. 1992) ("temporary assertions of custodial authority in the face of a reasonably perceived emergency do not violate due process"); *Doe v. Connecticut Dep't of Children and Youth Servs.*, 911 F.2d 868 (2d Cir. 1990); *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983) ("when a child's safety is threatened, that is justification enough for action first and hearing afterwards"); *Chayo v. Kaladjian*, 844 F. Supp. 163, 171 (S.D.N.Y. 1994) ("The Caseworkers had sufficient reason to believe that the Chayo children might be in imminent danger. The steps they took [i.e. temporary removal of children from parents' home for medical examination without court order or parental consent] in light of the information available to them and the risk of danger to the Chayo children were reasonable. Consequently, the plaintiffs were not deprived of due process by this temporary removal.")

It should be noted that the substance of what the child communicated to Murphy, and what Murphy, in turn, told James is essentially uncontroverted, viz. that Sarah's father hurt her through contact with her vaginal area at night. Being unable to factually call into question the substance of the message, plaintiffs seek to create a factual issue via an assault on the messenger:

> Mary Murphy, the source of the charge that plaintiff Marc Tenenbaum harmed his daughter, was not a reliable informant who had provided valuable or accurate information to the defendants in the past. *See, e.g., Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *U.S. v. Pea [Pena]*, 961 F.2d 333, 338, note 2 (2d Cir. 1992). Instead, Murphy was a novice school teacher, who had never before been involved in a child abuse investigation, and who had no prior contact whatsoever with the defendants or any other employees of the Child Welfare Administration.

(Pls.' Apr. 23, 1993 Mem. in Opp. at 23.)

Plaintiffs cite only criminal cases in support of their argument that if CWA workers "possess only uncorroborated information from an informant of untested reliability, they do not have probable cause . . . ." (Pls.' June 1, 1993 Reply Mem. at 7.) The present case, of course, is civil. The person speaking to James is a non-anonymous public school teacher, charged with a statutorily-created responsibility to report suspected incidents of child abuse. She would have no reason to fabricate, or otherwise color the nature of her communications with Sarah.[3] And James would have no reason to reject the information provided by Murphy simply because she had no prior contact with CWA and, therefore, could not be labelled as a "reliable informant" as that term is used in the field of criminal law. If that were a precondition to a finding of probable cause in a child abuse case, CWA would be unable to effect an emergency removal even if, for example, a teacher saw a parent commit a particularly heinous sexual act upon his or her child as they entered their home absent some type of independent proof confirming the accuracy of the teacher's report, unless that teacher had prior, and positive, contacts with CWA.

No authority has been advanced for the proposition that such a stringent standard is an essential component to a finding of probable cause in a child abuse case, and the court rejects the argument that it is.

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[3] No evidence has been elicited to even remotely lend credence to plaintiffs' claim that Murphy fabricated the entire scenario "because of . . . past disagreements with plaintiffs." (*See* Compl. at ¶ 21.)

One further argument raised by the plaintiffs warrants comment, that being whether the defendants' conduct in not removing the child until January 9th belies the existence of a claimed emergency.

To place this argument in context, a brief reiteration of certain facts is necessary. Based on Sarah's communications to Murphy, a report was made to the State Central Register on the morning of Friday, January 5th. The report was, in turn, faxed that same day to the CWA Brooklyn Field Office. Williams assigned the case to James and told her to contact the source of the information in an effort to verify its accuracy. James was unsuccessful in her efforts to reach Murphy on Friday afternoon, but did establish contact on Monday, January 8th. At that time, Murphy told James of the information she had received from Sarah. That information was relayed from James to Williams who instructed her to remove the child from school and have her medically examined, which was done on Tuesday, January 9, 1990.

The delay in this case appears to be reasonable. The three day hiatus between receipt of the report and the call for removal was occasioned by, *inter alia*, CWA's decision not to act until Murphy, as the source of the report, was personally interviewed. But assuming, *arguendo*, that there was no reason to wait three days before acting, does this delay invalidate the claim of emergency? The holding in *Doe v. Connecticut Dep't of Child and Youth Servs.* compels a negative answer to that question, as evidenced by the following excerpt:

> Nor does the fact that the defendant waited three days from receipt of the psychologist's report before invoking their authority under the state statute preclude the availability of qualified immunity. The suit sought

> damages for the removal of the child, not the delay in taking such action. The removal remained objectively reasonable when it was undertaken.

911 F.2d at 870 (emphasis added).

In sum, the court finds, as a matter of law, that the information provided by Murphy to James established reasonable grounds for the emergency removal of Sarah. Accordingly, none of the defendants violated a due process right of any of the plaintiffs. That being the case, James and Williams, as well as all of the other defendants are entitled to summary judgment on this, the first prong of the plaintiffs' procedural due process claim.

Before proceeding to the question of whether plaintiffs' procedural due process rights were compromised by the manner in which Sarah was subjected to a medical examination, qualified immunity -- as an *alternate* ground for granting summary judgment to James, Williams, Flowers and Trent will be discussed. Even if, *arguendo*, a material issue of fact were to be gleaned from the materials before the court, thereby precluding an award of summary judgment to all defendants vis-a-vis Sarah's removal, the caseworkers, together with Flowers and Trent would still be entitled to such relief under the doctrine of qualified immunity.

To partially reiterate, qualified immunity is available to defendant if his or her conduct, inter alia, was objectively reasonable or if "officers of reasonable competence could disagree on whether the probable cause test was met." *Robison*, 821 F.2d at 921. Measured against the second part of that standard, which recognizes the "Hobson's choice" often confronting those involved in the investigation of child abuse charges, *van Emrik v. Chemung County Dep't*

of Social Servs., 911 F.2d 863, 866 (2d Cir. 1990), James, Williams, Flowers and Trent may not legitimately be called upon to answer in damages for the events of January 1990. A juxtapositioning of the previously explained activities of James and Williams against the doctrine of qualified immunity compels that conclusion.[4]

2. Interference with Right to Choose Medical Treatment

The Tenenbaums also assert that defendants unconstitutionally interfered with their parental rights by having a pediatrician and gynecologist at Coney Island Hospital examine Sarah. Given the highly intrusive nature of this particular examination, which was solely for investigative purposes, the Court agrees.

Although Sarah's removal was based on probable cause to believe that an emergency existed, that circumstance ceased upon her custody being temporarily vested in CWA. She was then no longer in what was perceived to be harm's way. Thereafter, procedural due process required notice to the parents and judicial authorization before Sarah could be subjected to an inspection of her vagina and surrounding area. *See van Emrik v. Chemung County Dep't of Social Servs.*, 911 F.2d 863, 867 (2d Cir. 1990) ("we believe the Constitution assures parents that, in the absence of parental consent, x-rays of their child may not be undertaken for investigative purposes at the behest of state officials unless

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[4] Although discovery of Flowers and Trent has not commenced, it is clear -- as explained above -- that their activities vis-a-vis Sarah's removal, if any, are not actionable due to the defense of qualified immunity. If they are deposed, the purpose will be to elicit information bearing upon the question of liability of the City of New York with respect to the medical examination of Sarah.

a judicial officer has determined, upon notice to the parents and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances"); *cf. Chayo v. Kaladjian*, 844 F. Supp. at 169 ("The instant case [*Chayo*] is distinguishable . . . [from *van Emrik*] because the x-ray examinations [of the Chayo child] were ordered not by the caseworkers but by Doctor Ibrahm Ahmed, a pediatric resident at St. Vincent's Hospital, and for medical rather than investigative purposes.").[5]

Defendants argue that *van Emrik* is "factually distinguishable from the case at bar and is, therefore, inapplicable to this case." (Defs.' Mar. 5, 1993 Mem. at 19-20.) Granted, the medical examination of Sarah did not involve any physical risk, unlike the long-bone x-rays in *van Emrik* which did entail some possible risk of physical harm. But that fact does not render the rationale and holding of *van Emrik* irrelevant for present purposes. Here, as in *van Emrik*, time -- following the emergency removal -- permitted parental and judicial involvement prior to the medical examination being conducted. Harm to a child cannot legitimately be defined to exclude significant, and objectively reasonable emotional trauma. As noted in *Doe v. Renfrow*, "[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity." 631 F.2d 91, 92-93 (7th Cir. 1980) (emphasis added), *cert. denied*, 451 U.S. 1022, 101 S. Ct. 3015, 69 L. Ed. 2d 395 (1981); *see generally* Shatz,

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[5] Note that Sarah's case, unlike that of the child in *Chayo*, is factually akin to *van Emrik* in that a caseworker directed that a medical examination be conducted, which was done solely for investigative purposes.

Donovan & Hong, *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 11-14 (1991) (a strip search, for a child, is "akin to sexual abuse.").

Sarah was subjected to intrusive bodily examinations by two strangers, in a strange location, in the absence of a parent or other reassuring figure. While the child in *van Emrik* faced the possibility of physical injury, Sarah, almost certainly, did, in fact, experience psychological injury on January 9, 1990.

Defendants maintain that the expedited procedure employed by CWA on that date actually benefited plaintiffs by abbreviating the interval between Sarah's removal and return to her family. (Defs.' Mar. 5, 1993 Mem. at 20-21.) This argument trivializes the constitutional implications of the State subjecting a person to an investigatory, intrusive medical examination without notice, and an opportunity to be heard, within the context of a judicial proceeding.

In sum, plaintiffs have established, as a matter of law, that their procedural due process rights were violated by the manner in which Sarah was subjected to a medical examination on January 9, 1990. However, in *van Emrik*, the Second Circuit found the individual defendants immune because the law was not settled at the time the events in that case occurred. The events at issue in the present case also occurred when the law establishing this right was not settled, prior to the Second Circuit's decision in *van Emrik*. The individual defendants here, as in *van Emrik*, are therefore immune from suit. Accordingly, Williams, James, Flowers and Trent are entitled to summary judgment on this claim. The City of New York, however, not having the benefit of the qualified immunity defense, may still be liable to the Tenenbaums under the principles of municipal liability previously discussed.

IV. Fourth Amendment Claims

A. Seizure of the Child from School

The Tenenbaums also allege that defendants' removal of Sarah from school violated her Fourth Amendment right to be free from unreasonable seizures because defendants lacked probable cause to believe she had been abused.

While at least one court has questioned whether taking custody of a minor is violative of the child's liberty interest (on the theory that custody is merely transferred from the parent to the state), see *Lossman v. Pekarske*, 707 F.2d 288 (7th Cir. 1983), the sounder view, and apparently the law in this Circuit, is that the state's assumption of custody is a seizure under the Fourth Amendment. *See van Emrik*, 911 F.2d at 867 ("That interest [viz. the parents' decision-making role concerning medical procedures for child] assumes special significance when the procedures undertaken at the initiative of a state official serve primarily an investigative function; in such circumstances, Fourth Amendment and bodily integrity interests of the child are implicated, interests the parents are entitled to assert on the child's behalf.") (citations omitted); *cf. Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993) ("'Although confinement of the mentally ill by state action is generally analyzed under the due process clause of the fourteenth amendment, we analyze the distinct right to be free from an unreasonable government seizure of the person for whatever purpose'") (quoting *Maag v. Wessler*, 960 F.2d 773 (9th Cir. 1991)). The seizure of Sarah, then, implicates her Fourth Amendment rights.

The same may not be said of her parents to the extent that they have sued individually, as well as on Sarah's behalf.

Neither Marc nor Mary Tenenbaum has been the subject of a search or a seizure. *See Donald v. Polk County*, 836 F.2d 376 (7th Cir. 1988) (the "removed" child, her parents and her siblings sued the Polk County Department of Social Services under 42 U.S.C. § 1983, claiming, *inter alia*, a violation of their Fourth Amendment rights; court held that "none of the plaintiffs in this case have [sic] been the object of a search and seizure, with possible exception of . . . [the child]," thereby impliedly rejecting the notions that a parent suffers derivative harm, and that a child constitutes an "effect," for Fourth Amendment purposes.). Moreover, the Court is not aware -- based on its own research and the submissions of counsel -- of any federal decision which has held that a parent may legitimately assert an individual, as distinct from representative, Fourth Amendment claim based upon the seizure of a child.

A parent's protection under such circumstances is to be found elsewhere in the Constitution, often in the due process clause of the Fourteenth Amendment. That is the situation with respect to Marc and Mary Tenenbaum.

Given that defendants' conduct falls within the ambit of the Fourth Amendment as to Sarah, this court must consider what standard to apply in judging the constitutionality of the seizure. The Supreme Court has not had occasion to answer the question of whether probable cause, or some lesser standard, governs the removal of children in cases of suspected abuse or neglect, and the Second Circuit has written little on the subject.[6]

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[6] What guidance there is from the Second Circuit, however, seems to indicate that "probable cause" is the standard. *van Emrik*, 911 F.2d at 867; *Doe v. Connecticut Dep't of Children and Youth Servs.*, 712 F. Supp. 277, 284 (D. Conn. 1989) ("The emergency removal of John Doe requires 'probable cause' to believe that he was in immediate physical

Searches and seizures effected by police for law enforcement purposes may occur only pursuant to a warrant[7] supported by probable cause unless within "a few specifically established and well-delineated exceptions." *Coolidge v. New* Hampshire, 403 U.S. 443, 454-5, 91 S. Ct. 2022 5, 29 L. Ed. 2d 564 (1971) (citations omitted).

Outside the realm of criminal law, however, the Supreme Court has approved searches and seizures on less than probable cause where the government has "'special needs, beyond the normal need for law enforcement.'" *O'Connor v. Ortega*, 480 U.S. 709, 720, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987) (quoting Blackmun, J., concurring in *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S. Ct. 733, 747, 83 L. Ed. 2d 720 (1985)). In such cases, searches and seizures remain subject to the general reasonableness requirement of the Fourth Amendment. *T.L.O.*, 469 U.S. at 341, 105 S.Ct at 742.

The Supreme Court has used special needs to justify departure from the requirements of probable cause and a warrant when special needs "'make the warrant and

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danger from his surroundings and that removal was necessary to insure his safety."), *aff'd*, 911 F.2d 868 (2nd Cir. 1990).

[7] Throughout this decision, the word "warrant" and the term "judicial authorization" will be used interchangeably as synonyms, with the understanding that a judicial authorization in the present context, and thus a "warrant," might consist of, *inter alia*, an oral court order given over the telephone, followed by a confirmatory written order. Parenthetically, such a practice was often utilized -- with the telephone call being taped -- in the Family Court of Suffolk County for Section 1022 applications under the Family Court Act (*see* p. 970, n.2 *supra*) when the author of this opinion served in that court in the early- to mid-1980s.

probable-cause requirements *impracticable*.'" *O'Connor*, 480 U.S. at 720, 107 S. Ct. at 1499 (quoting Blackmun, J., concurring in *T.L.O.*, 469 U.S. at 351, 105 S. Ct. at 747 (emphasis added)). Alternatively, the Court has stated that it will dispense with a warrant and probable cause when they are "'*likely to frustrate* the governmental purpose behind the search.'" *O'Connor*, 480 U.S. at 720, 107 S. Ct. at 1499 (quoting *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 533, 87 S. Ct. 1727, 1733, 18 L. Ed. 930 (1967) (emphasis added)). In another case, the Court held that a warrant was not required where it would "interfere to an appreciable degree" with the government scheme. *Griffin v. Wisconsin*, 483 U.S. 868, 876, 878, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987). [8]

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[8] In each case where the Court has found special needs to justify lifting the warrant and probable cause requirements, it has analyzed separately the burdens imposed by each requirement.

In *T.L.O.*, the court approved searches of school children subject only to a requirement of reasonableness. The Court held that probable cause was not required based on the need to relieve teachers of the burden of learning "the niceties of probable cause," 469 U.S. at 343, 105 S. Ct. at 743 and to allow them "freedom to maintain order." Id. at 341, 105 S. Ct. at 742. It held that the warrant requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340, 105 S. Ct. at 742.

In *O'Connor*, the Court dispensed with the warrant requirement in the search of a government employee's office because "requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome." 480 U.S. at 722, 107 S. Ct. at 1500. Probable cause was not required because it would cause "the work of [government] agencies [to] suffer." 480 U.S. at 723, 107 S. Ct. at 1500.

In *Griffin*, the Court held that a probationer's home could be searched without probable cause or a warrant because those requirements would "make it more difficult for probation officials to respond quickly to

Should a lesser standard than probable cause and a warrant be utilized in child abuse cases, due to special needs making the requirements "impracticable," or likely to "frustrate the governmental purpose" behind the search, or likely to "interfere to an appreciable degree" with the government goal involved?

Before endeavoring to answer that question, it may be helpful to try and determine the likely impact of the application of the probable cause/warrant standard on society's efforts to combat abuse and neglect of its children. That process should shed light on whether any one or more of the above mentioned grounds for relaxing those requirements is applicable in the present context. If so, perhaps a lesser standard should control. But if not, no justification exists for a departure from the constitutional norm.

Probable Cause

Probable cause requires only that a magistrate "make a practical, commonsense decision whether, given all the circumstances . . . before him [or her] . . . there is a fair probability" that the facts to which the probable cause determination is addressed exist." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The application of this standard should not hinder child abuse investigations. Abusive or neglectful conduct witnessed by neighbors and other identified individuals, and signs of abuse in the appearance and behavior of

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evidence of misconduct," would substitute a magistrate for the probation officer "as the judge of how close a supervision the probationer requires," and "would reduce the deterrent effect of the supervisory arrangement." 483 U.S. at 876-79, 107 S. Ct. at 3169-71.

children detected by teachers and child care workers, routinely provide probable cause to believe that a child has been abused or neglected.

The feasibility of a probable cause requirement is supported by the law of New York, which requires that before a child may be removed, in an emergency situation, government officials possess "reasonable cause," the equivalent of probable cause,[9] to believe the child is in danger of harm. N. Y. Fam. Ct. Act § 1024. Thus, had Williams and James, contrary to the fact, lacked probable cause to believe Sarah was in danger at toe time James removed her from school, they would have violated state law in addition to the Constitution.

One concern of a probable cause requirement is that anonymous reports alone would not justify searches or seizures in furtherance of an investigation. Assuming that such a report were sufficiently corroborated, however, it would pass constitutional muster. *Gates,* 462 U.S. at 241-43, 103 S. Ct. at 2333-35. While uncorroborated, anonymous tips could not provide probable cause, *Gates,* 462 U.S. at 227, 103 S. Ct. at 2326, this court does not believe that the seizure of a child based on such tips, possibly motivated by malice, comports with the Fourth Amendment. Even under the lesser standard of reasonable suspicion, which is the sole alternative to probable cause in

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[9] *People v. Stockman*, 159 Misc. 2d 730, 734 n.4, 606 N.Y.S.2d 864, 867 n.4 (Justice Ct. 1993). *See also*, *People v. Hetrick*, 80 N.Y.2d 344, 349-50, 604 N.E.2d 732, 735, 590 N.Y.S.2d 183, 186 (1992) (reasonable cause and probable cause to arrest are used interchangeably). Reasonable cause in family court proceedings is the equivalent of reasonable cause in criminal cases. *Commissioner of Social Services ex rel. Riddle v. Rapp,* 127 Misc. 2d 835, 487 N.Y.S.2d 477, 481-82 (Fam. Ct. 1985).

this case,[10] an entirely uncorroborated anonymous tip would generally not provide grounds for a search or seizure. *Alabama v. White,* 496 U.S. 325, 329, 110 S. Ct. 2412, 2415, 110 L. Ed. 2d 301 (1990).

The Supreme Court has rejected probable cause in some cases, in part, to relieve government officials such as school teachers and administrators and public employers of "the necessity of schooling themselves in the niceties of probable cause." *T.L.O.*, 469 U.S. at 343, 105 S. Ct. at 744; *see also O'Connor*, 480 U.S. at 724, 107 S. Ct. at 1501. Caseworkers investigating child abuse, however, like police officers, routinely conduct investigative seizures and searches. Requiring familiarity with the Fourth Amendment will not, therefore, be unduly burdensome.

In *Wyman v. James*, 400 U.S. 309, 317-19, 91 S. Ct. 381, 385-8727 L. Ed. 2d 408 (1971), the Supreme Court held that a child welfare visit by a caseworker to the home of a government benefit recipient, if, *arguendo*, a search, did not require probable cause. In *Wyman*, however, the court based its decision on the fact that the home visit by the caseworker was primarily rehabilitative, that it was "not forced or compelled," and that the state was entitled to place conditions on the award of benefits to insure their proper use. *Id.* By contrast, the seizure in the present case was for investigative purposes, plaintiffs had no right or

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[10] Were the court to dispense with probable cause, some degree of individualized suspicion would still be required to allow seizures of children. In *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 105 S. Ct. 3304, 3310, 87 L. Ed. 2d 381 (1985), the Supreme Court rejected the creation of a third standard of individualized suspicion in addition to probable cause and reasonable suspicion as inconsistent with "the Fourth Amendment's emphasis upon reasonableness" and because "subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question."

opportunity to oppose it, and no public monies were involved. *Wyman* does not, therefore, support a standard less than probable cause in the present case. *See Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits*, 89 Colum. L. Rev. at 1051-53 (arguing that *Wyman* is inapposite to child abuse investigation searches and seizures).

Warrant

Like probable cause, a warrant is unlikely to frustrate the state's attempts to investigate child abuse. New York law mandates judicial authorization to seize a child absent an emergency, and this requirement is complied with on a routine basis without deleterious consequences. *See* N.Y. Fam. Ct. Act § 1022 (pertaining to court order for temporary removal of child before petition charging abuse or neglect filed) and § 1024 (pertaining to "emergency removal[s] without court order"); *see also* Besharov, Practice Commentary to N.Y. Fam. Ct. Act § 1022 at 314 (1983).

In sum, upon analysis of the burdens they would impose, it appears that neither probable cause, nor a warrant in the sense of prior oral or written judicial authorization (*see* discussion *supra* at 974 n.7), is "impracticable," or likely to "frustrate the governmental purpose" or "interfere to an appreciable degree" with the government goal of effectively addressing the child abuse problem. Therefore, the court concludes that the probable cause and warrant requirements apply to child abuse searches and seizures under the Fourth Amendment.

Returning to the present case, probable cause existed for Sarah's emergency removal on January 9, 1990 and

accordingly, her Fourth Amendment rights were not violated by the removal.

Alternatively, the individual defendants in this case are entitled to qualified immunity because the application of the probable cause and warrant requirements to child abuse investigations by caseworkers was unsettled at the time of defendants' investigation, and still, as noted at pages 973 and 974, *supra*, is unclear. Even if the general principles of law were sufficiently defined in January 1990 to place potential defendants on notice, the individual defendants here would still be immune from civil liability "because it was objectively reasonable for them to believe they violated no . . . [Fourth Amendment] rights when they seized . . . [Sarah]." *Robison*, 821 F.2d at 921.

While the Courts in *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993), and *Good v. Dauphin County Social Servs.*, 891 F.2d 1087, 1094 (3d Cir. 1989), held that Fourth Amendment jurisprudence was sufficiently well developed to place persons investigating child abuse on notice of its applicability to their work, those cases involved searches or seizures by or with the participation of police officers, whose conduct is regularly governed by the Fourth Amendment. By contrast, in *Landstrom v. Illinois Dep't of Children & Family Servs.*, 892 F.2d 670, 676-77 (7th Cir. 1990), and *Darryl H. v. Coler*, 801 F.2d 893, 908 (7th Cir. 1986), the Seventh Circuit held that caseworkers were immune from claims under the Fourth Amendment because its application to child abuse investigations was unsettled.

All defendants are entitled to summary judgment. Sarah's removal was the result of a reasonably perceived emergency, coupled with probable cause, thereby being in full compliance with the requirements of the Fourth Amendment. Alternatively, even if, *arguendo*, such were

not the case, the individual defendants, viz. Williams, James, Flowers and Trent, would be entitled to summary judgment on the basis of qualified immunity. That defense, of course, is not available to the City.

B. "Body Cavity" Examination

The Tenenbaums assert that defendants also violated Sarah's Fourth Amendment rights by arranging for doctors at Coney Island Hospital to conduct what plaintiffs label as a "strip search" and a "body cavity" examination of her. Such examinations in a child abuse context have not been addressed by the Supreme Court, and this issue appears to be one of first impression in this Circuit.[11] Semantics aside, the medical examination of Sarah's vagina and surrounding areas is clearly a search within the meaning of the Fourth Amendment.

The existence of an emergency, coupled with probable cause, justified Sarah's removal. That emergency did not extend, as noted previously, to the invasive, investigatory examination to which Sarah was thereafter subjected.[12]

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[11] Plaintiffs cite a variety of cases involving either strip searches or body cavity searches of inmates and arrestees and impliedly analogizes these cases to those involving medical examinations of suspected victims of child abuse.

Defendants' argument simply seeks, unpersuasively, to distinguish *van Emrik* from the case at bar, supplemented by the comment that the "federal removal standard articulated in *Robison v. Via* should be sufficient to permit a medical examination to determine if Sarah was sexually abused." (Defs.' May 20, 1993 Reply Mem. at 24.)

[12] In the rare event that investigating officials reasonably believe that evidence of abuse is likely to disappear before a warrant can be obtained, exigent circumstances arguably would permit an intrusive examination without a warrant. *Cf. Schmerber v. California,* 384 U.S. 757, 770-71, 86 S. Ct. 1826, 1835-36, 16 L. Ed. 2d 908 (1966)

Therefore, the examination -- done without judicial authorization -- constituted a violation of the Fourth Amendment.

Decisions by other courts support the requirements of both probable cause and a warrant for intrusive examinations of children for evidence of abuse. In *Good v. Dauphin County Social Servs.*, 891 F.2d 1087, 1092-93 (3d Cir. 1989), the Third Circuit held that a strip search of a child as part of an investigation of abuse was constitutional only if conducted pursuant to a warrant issued on probable cause, absent consent or exigent circumstances.

In *Franz v. Lytle*, 997 F.2d 784, 788 (10th Cir. 1993), the Tenth Circuit held that a warrant issued on probable cause was required before a police officer investigating alleged child abuse could constitutionally probe the child's genitals for evidence of abuse and subject her to a medical examination by a doctor.[13]

In contrast to *Good* and *Franz*, the Seventh Circuit in *Darryl H. v. Coler* held that visual inspections of the unclothed bodies of children for evidence of child abuse could be justified without a warrant or probable cause, upon a showing of reasonableness, "balancing . . . the need for the particular search against the invasion of personal rights that the search entails." 801 F.2d 893, 902-03 (7th Cir. 1986) (citation omitted).

(evanescent nature of defendant's blood-alcohol level permitted blood test without a warrant).

[13] The facts of this case are set forth in *Franz v. Lytle*, 791 F. Supp. 827, 829 (D. Kan. 1992).

While this court does not necessarily disagree with the holding in *Darryl H.*, it regards the examination in the present case as categorically different from the examination conducted in that case. *See Franz v. Lytle*, 997 F.2d 784, 790-91 (10th Cir. 1993) (distinguishing visual inspections and inspections involving touching a child's nude body). Requiring a warrant for a mere visual inspection (following an emergency removal based on probable cause) -- particularly of asexual parts of the anatomy -- could frustrate child welfare workers in their efforts to uncover child abuse by converting a quick inspection into a time-consuming procedure.

In sum, the invasive search of Sarah -- given the fact that the emergency which justified her removal no longer existed at the time of the investigatory medical examination -- violated the Fourth Amendment, as well as the procedural due process component of the Fourteenth Amendment as previously discussed.

However, as also discussed *supra*, the application of the Fourth Amendment to child abuse investigations was insufficiently established at the time of defendants' investigation to overcome their defense of qualified immunity. Williams, James, Flowers and Trent are, therefore, entitled to summary judgment. That defense is not available to the City of New York. Accordingly, under the circumstances discussed previously, the City might be liable to plaintiffs for the failure to obtain judicial authorization for the medical examination of Sarah.

V. Right to an Adequate Investigation

Plaintiffs also assert an independent right to an "adequate investigation" prior to "endangerment" of their

constitutional rights. The Constitution affords plaintiffs no such right.

Plaintiffs cite several cases in which courts found searches or seizures to be unreasonable based in part on the failure of government officials to adequately investigate the facts of the case prior to conducting the search or seizure. *E.g.*, *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986) (failure to investigate made arrest unreasonable); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 888-89 (6th Cir. 1991) (school officials would be required to investigate an anonymous tip before conducting a search or seizure). As these cases illustrate, allegations of inadequate investigation are a component of plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures. As stated, supra, however, defendants possessed probable cause to seize Sarah. The constitutional flaw associated with the examination arises from the law of judicial authorizations, not from an inadequate investigation. All defendants are therefore entitled to dismissal of this claim.

VI. Violation of 42 U.S.C. § 671(a)

Plaintiffs assert that defendants' failure to make "reasonable efforts" to provide services to preserve their family violates 42 U.S.C. § 671(a). However, the "reasonable efforts" provision of Section 671(a) does not confer a private right of action, nor may it be enforced in an action pursuant to 42 U.S.C. § 1983. *Suter v. Artist M.*, __ U.S. __, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992). Accordingly, all defendants are entitled to summary judgment on this claim.

VII. Claims by Mary Tenenbaum

Plaintiff Mary Tenenbaum argues that, whatever allegations defendants received regarding abuse by her husband, they had no information implicating her, and they therefore violated her rights by removing and examining Sarah. By plaintiffs' reasoning, however, a caseworker could remove a child only when all adults residing in the household participate in abuse. That is not the law. Sarah was temporarily removed from the home in which she and the suspected abuser resided. The fact that Mary Tenenbaum also was a member of that household and, therefore, incidentally impacted by the removal, is not violative of her constitutional rights.

VIII. Claims Against the Board of Education

Plaintiffs claim that the New York City Board of Education violated their constitutional rights when its employees (1) participated in James' questioning of Sarah on Monday, January 8, 1990, (2) helped James remove Sarah from school on January 9, 1990, and (3) searched Sarah at some time prior to the report of child abuse.[14] (Pls.' Apr. 23, 1993 Mem. in Opp. at 43-45.)

These activities are said to be the result of Board policies, thereby rendering the Board answerable in damages to the

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[14] In paragraphs 36 and 37 of the complaint, plaintiffs allege that the Board had a policy of permitting dolls to be used by improperly trained teachers during child abuse investigations. This claim is not addressed by plaintiffs in opposing defendants' motion for summary judgment. That apparently is not by way of oversight, but rather is attributable to the fact that there is no evidence in the record -- including the deposition of Murphy -- to support the conclusion that such a policy, if it existed, had any bearing on the alleged constitutional deprivations.

Tenenbaums. More particularly, it is alleged in their complaint that the Board:

1. had a policy of permitting the Department of Social Services to remove children from schools without parental consent, a court order, or the presence of an emergency, and

2. had a policy permitting its employees to conduct strip searches of children in the course of their investigations of child abuse allegations.

As noted earlier, discovery of plaintiffs' *Monell* claims has been stayed. However, Murphy and James have been extensively deposed concerning a number of subjects, including what transpired at the school on January 8th and January 9th, 1990.

As to the claimed complicity of Board employees in the questioning and removal of Sarah from school, it is true that the Board of Education's employees acted pursuant to its policies in helping James remove Sarah. See Regulation of the Chancellor, No. A750, Reports of Suspected Child Abuse and Maltreatment at 4-6 (May 5, 1989). That assistance, however, did not violate plaintiffs' rights. Plaintiffs argue that the Board of Education should be held liable because its employees conspired with James. To establish a conspiracy to violate a person's civil rights, however, a plaintiff must establish that defendants "'reached an understanding' to violate [plaintiff's] rights." *Strength v. Hubert,* 854 F.2d 421, 425 (11th Cir. 1988) (citations omitted); *see also Dahlberg v. Becker*, 748 F.2d 85, 93 (2d Cir. 1984) ("meeting of the minds" must occur for a civil rights conspiracy to exist). In the present case, there is no basis for concluding that the employees of the Board of Education reached an understanding with James

to deprive the Tenenbaums of their rights under the Constitution. Rather, the Board of Education's employees merely permitted another state official, James, to perform what she believed to be her duties, after being presented with a form indicating that Sarah was being taken into custody pursuant to New York Social Service Law § 417 and New York Family Court Act § 1024. CWA did not need the approval of the Board's employees to effect the removal, and the Board's employees had no right to obstruct the removal.

Moreover, as to the employees' involvement in *both* the questioning and removal of Sarah, any implicated Board policies could not have been a proximate cause of the claimed wrongs. The information before the Court indicates the absence of any material fact which calls into question the propriety of what Murphy and the others at the school did, or did not do, regarding Sarah's removal, notwithstanding the previously mentioned depositions of the individual actors which were conducted by plaintiffs' counsel. Plaintiffs' statements are purely conclusory, devoid of factual underpinnings. Moreover, it must be remembered that the removal by CWA was proper, being based on probable cause and a reasonably perceived emergency.

However, plaintiffs' last claim, to wit, that school employees searched Sarah pursuant to Board policy, sometime prior to the CWA investigation, is not subject to summary judgment.

Defendants deny that Sarah was strip-searched by a school employee. Plaintiffs maintain that, at the very least, a factual issue exists as to whether such a search occurred. In support of that proposition, plaintiffs argue the following:

> Defendant Williams himself told Mary Tenenbaum that the school teachers had searched her daughter and found a bruise on the vagina. (Decl. of Mary Tenenbaum, ¶ 24.) Sarah Tenenbaum confirmed the statement when she told her mother that the teachers had undressed her. (Decl. of Mary Tenenbaum, ¶ 22.)
>
> Moreover, defendant James testified that kindergarten teacher Mary Murphy knew of the strawberry birthmark's on Sarah Tenenbaum's upper leg. (James Dep. at 25.) Murphy could not have been aware of that mark unless she had undressed Sarah. (Decl. of Mary Tenenbaum, ¶ 21.) Williams also said that Murphy had shown James that birthmark. (Williams Dep. at 70.)

(Pls.' Apr. 23, 1993 Mem. in Opp. at 44-45.)

Rule 56(e) of the Federal Rules of Civil Procedure provides, *inter alia*, that affidavits "shall set forth facts as would be admissible in evidence . . . ." The question, then, is what information have plaintiffs provided which may be considered in determining whether summary judgment is appropriate, i.e. information that "would be admissible in evidence"? Nothing in Mary Tenenbaum's Declaration meets that standard. Her assertions are clearly hearsay. *See* Fed. R. Evid. 801. Moreover, what Williams supposedly said concerning teachers searching Sarah could not be received in evidence because his statement, if made, would not be binding on the Board or any of its employees as an admission, *id.* at 801(d)(2), or otherwise. The daughter's statement similarly is not admissible evidence.

The testimony of James at page 25 of her transcript does not fully dovetail with plaintiffs' representation as to what was said at the deposition. Thus, the transcript, unlike the

memorandum of law, never refers to "a strawberry birthmark on Sarah Tenenbaum's upper leg." Rather there is reference to Murphy wanting to show James "something," which Murphy said James had already seen, presumably at the Tenenbaums on the preceding Friday. However, reading that passage in conjunction with page 70 of Williams' deposition suggest that Murphy was talking to James about such a mark. However, there is no evidence in the record to indicate that Murphy ever personally observed the mark. Indeed, she testified that she never did see such a mark. Her testimony on the subject was as follows:

> Q When Mrs. James was at the school the day before on Monday, did you have discussion with her about a mark on Sarah's thigh?
>
> A I did mention to her that the gym teacher had seen a red mark on her thigh.
>
> Q Had you ever seen this mark?
>
> A No.
>
> Q When did the gym teacher tell you about the mark?
>
> A Maybe, two or three weeks before.
>
> Q What is the gym teacher's name?
>
> A Clint Eubanks.
>
> Q Is it a man?
>
> A Yes.
>
> Q What did Mr. Eubanks tell you exactly?

A That she was playing around in gym and she was wearing a skirt that day and he noticed that she had a red mark.

(Murphy Dep. at 36.)

The above excerpt from Murphy's deposition creates a material issue of fact. Defendants deny that Sarah was strip-searched. Murphy testified that another school employee, Eubanks, told her that he saw a mark on Sarah's upper thigh. Mary Tenenbaum has indicated that Sarah always wore opaque tights to school, thereby precluding anyone at the school from seeing the mark unless Sarah's tights were first removed.

Granted, the information furnished by Murphy is second-hand. Yet, it would be admissible evidence (thereby satisfying the requirements of Rule 56(e)) as an "admission by a party-opponent" under Rule 801(d)(2)(D).

For the above reasons, this claim against the Board[15] n15 -- which pertains to the SEVENTH CAUSE OF ACTION in the complaint -- survives defendants' motion for summary judgment.

IX. State Law Claims

New York provides absolute immunity for state and local employees when they perform discretionary, as opposed to ministerial, functions. *Tango v. Tulevech,* 61 N.Y.2d 34,

[15] Plaintiffs have apparently abandoned their initial claim that James participated in a "strip search" of Sarah. (Compl. at ¶ 102.) Therefore, the sole remaining targeted defendant -- as the issue was framed in the summary judgment motions -- is the Board.

40, 459 N.E.2d 182, 185, 471 N.Y.S.2d 73, 76 (1983). The state itself and its subdivisions are also entitled to absolute immunity when an official performs a discretionary function. *Arteaga v. State*, 72 N.Y.2d 212, 216, 527 N.E.2d 1194, 1196, 532 N.Y.S.2d 57, 58-59 (1988). The Court of Appeals defines "discretionary acts" as those which "involve the exercise of reasoned judgment which could typically produce different acceptable results," *Tango*, 61 N.Y.2d at 41, 459 N.E.2d at 186, 471 N.Y.S.2d at 77.

In *Tango*, the Court of Appeals held that the decision of a probation officer to give custody of two children to one of their parents was discretionary in nature, and that she was therefore entitled to absolute immunity. 61 N.Y.2d at 41-42, 459 N.E.2d at 186, 471 N.Y.S.2d at 76-77. While the Second Department has held that negligent placement and supervision of a child in foster care is actionable, *Barnes v. County of Nassau,* 108 A.D.2d 50, 487 N.Y.S.2d 827 (2d Dep't 1985), it specifically distinguished between the discretionary "decision to remove or not to remove a child from its parents" and the placement of a child in foster care, which "must be accomplished in accordance with a governing rule or standard of reasonable care." *108 A.D.2d at 54, 487 N.Y.S.2d at 830.* In the present case, Williams and James exercised their discretion when making the decision to interview Sarah, remove her from school, and subject her to a medical examination. Their decisions involved the exercise of judgment which could reasonably produce different results. All defendants are therefore entitled to absolute immunity.

Defendants' motion for summary judgment is therefore granted on all of the Tenenbaums' state law claims.

CONCLUSION

As to the causes of action alleged in the complaint, plaintiffs' application for summary judgment is denied, *in toto* and defendants' application is granted in part and denied in part.

Plaintiffs have established that the invasive physical examination of Sarah, following her emergency removal, was violative of the procedural component of the due process clause of the Fourteenth Amendment, and constituted a violation of the Fourth Amendment, as well. However, those defendants who were sued individually with respect to the medical examination are entitled, as a matter of law, to qualified immunity. That defense is not available to the defendant City of New York. Therefore, to the extent the constitutional deprivations are traceable to a policy, procedure, or other actionable wrong of the City, that defendant may be called upon to answer to the Tenenbaums in damages. In addition, the pre-seizure "strip search" claim against the Board of Education remains viable, there being material issues of fact with regard to this claim. Such being the case, it appears to the court that the stay imposed by Judge Amon on the *Monell* claims against the City of New York and the Board of Education should be lifted. However, rather than so ordering, *sua sponte*, counsel for City and the Board is directed to advise the Court and plaintiffs' counsel, on or before October 24, 1994, as to whether it opposes plaintiffs pursuing discovery against the City and Board regarding the remaining claims and, if so, why. If nothing is received from counsel by that date, the stay shall be lifted and discovery may proceed.

Defendants' counsel shall submit a proposed order, on notice, on or before October 24, 1994, indicating, inter alia, the causes of action, by number in the Complaint, that have

survived the motion for summary judgment (i.e. those pertaining to the medical examination, and the pre-seizure "strip search" of Sarah), and the complaint numbers of the causes of actions that have been dismissed, consistent with this decision.

SO ORDERED.

Marc TENENBAUM and Mary Tenenbaum, individually and on behalf of Sarah Tenenbaum, an infant, Plaintiffs,

v.

Nat WILLIAMS, individually and as caseworker, Child Welfare Administration, Veronica James, individually and as caseworker, Child Welfare Administration, Doby Flowers, individually, Marva Livingston Hammons, as Commissioner of Social Services of the City of New York, Brooke Trent, individually, Claude Meyers, as Deputy Commissioner of Social Services of the City of New York, City of New York, and New York City Board of Education, Defendants.

No. 91-CV-0037 (DRH)

United States District Court,
E.D. New York

907 F. Supp. 606

Nov. 20, 1995.

Lansner & Kubitschek by Carolyn A. Kubitschek and David J. Lansner, New York City, for Plaintiffs.

Paul A. Crotty, New York City Corporation Counsel by Bruce Rosenbaum, New York City, for Defendants.

MEMORANDUM AND ORDER

HURLEY, District Judge

Defendants have moved, pursuant to Federal Rules of Civil Procedure 54(b) and (6)(b) and Civil Rule 3(j) of the

Rules of the United States District Courts for the Southern and Eastern Districts of New York, for reargument and reconsideration of the portion of this Court's Memorandum and Order dated September 30, 1994, which held that a caseworker who has lawfully effected an emergency removal of a child from her home without a court order must, nonetheless, provide notice to the parents and obtain judicial authorization before directing an invasive investigatory medical examination of the child.

Defendants' motion for reargument is denied as untimely. However, had reconsideration been granted, the Court would have adhered to its original decision. Given the importance of the interests involved in the present litigation, a two part, disjunctive, analysis has been undertaken rather than simply concluding the inquiry based upon the belated nature of defendants' request.

BACKGROUND

The facts, and original concomitant arguments of counsel, are fully set forth in this Court's decision of September 30, 1994. Familiarity with the contents of that decision will be presumed for present purposes. By way of a brief synopsis, however, the essential facts include the following:

1. On January 9, 1990, the Child Welfare Administration removed five year old Sarah Tenenbaum from her kindergarten class at P.S. 230 in Brooklyn, pursuant to the emergency removal provisions of Family Court Act Section 1024 and Social Service Law Section 417.[1] The basis for

[1] New York Family Court Act Section 1024(a)(ii) authorizes removals in emergency situations where "there is not enough time to apply for a [court] order . . . ." Social Service Law Section 417 permits "pursuant to the requirements and provisions of the family court act," a caseworker to take a child into protective custody, without the consent

the emergency removal was probable cause to believe that the child had been sexually abused by her father.

2. Sarah was taken directly from her kindergarten class to Coney Island Hospital where she was subjected to a gynecological examination. It is undisputed that the sole purpose of that examination was to determine whether sexual abuse had occurred. No claim has been advanced, directly or indirectly, that the examination was related to necessary medical care or treatment of the child following assumption of custody by the Child Welfare Administration.

3. The results of the gynecological examination were negative and the child was reunited with her parents later that day.

4. No efforts were made by the Child Welfare Administration to obtain judicial authorization for the invasive examination of Sarah, nor to obtain parental consent, or to otherwise notify the parents of what was transpiring until after the fact.

Sarah's parents filed a complaint, pursuant to 42 U.S.C. Section 1983, alleging a myriad of constitutional violations committed by defendants against them and their daughter. The defendants answered that their conduct was in full conformity with applicable law and even if, *arguendo*, that was not the case, the individual defendants were insulated from liability pursuant to the doctrine of qualified immunity.

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of a parent, if there is reasonable cause to believe that the failure to do so will present "an imminent danger to the child's life or health."

The Court, in its decision of September 30, 1994, granted defendants' application for summary judgment in large measure, but denied it in part. Plaintiffs' cross-motion for summary judgment was denied *in toto*. The partial denial of the defendants' motion was premised on the Court's conclusion that plaintiffs had established, based on the uncontroverted facts, that the invasive physical examination of Sarah, following her emergency Section 1024 removal, was violative of the due process clause of the Fourteenth Amendment, and constituted a violation of her Fourth Amendment rights as well.

The individual defendants were found to be entitled, as a matter of law, to qualified immunity under the facts as presented and, accordingly, the claims against them were dismissed. That defense, of course, is not available to the City of New York. Therefore, if the constitutional deprivations are traceable to a policy, procedure or other actionable wrong of the City, that defendant may be called upon to answer in damages. For that reason, defendants' motion for summary judgment dismissing the claims against defendant City of New York was denied.[2] n2

POSITIONS OF PARTIES RE: MOTION FOR RECONSIDERATION

In seeking reargument and reconsideration, defendants rely primarily on the following three arguments:

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[2] In addition to the plaintiffs' claims against the City of New York, a claim against defendant Board of Education survived defendants' application for summary judgment. That claim -- which is not germane with respect to the present motion -- involves a disputed issue of fact as to whether Sarah was subjected to a strip search by school employees sometime before she was taken into protective custody by the Child Welfare Administration on January 9, 1990.

1. the Court failed to consider Social Services Law Section 383-b (entitled "Medical Treatment for Abused or Neglected Children; Consent of Commissioners") which, defendants maintain, rendered prior judicial approval or parental consent unnecessary for the gynecological examination of Sarah;

2. the Court's reliance on *van Emrik v. Chemung County Dep't of Social Serv.*, 911 F.2d 863 (2d Cir. 1990) was misplaced, *inter alia*, because the removal of the child in *van Emrik* occurred after, not before, the investigatory medical procedure was conducted. In contrast, the emergency removal in the present case occurred before the examination. That distinction, or so defendants' argument continues, renders the analysis in *van Emrik* irrelevant for present purposes; and

3. the Court's decision is factually flawed for it fails to consider the bureaucratic complexities of Family Court practice in the five boroughs of New York City.

In opposition to the relief requested by defendants, plaintiffs argue that:

1. defendants' motion is untimely under Civil Rule 3(j) of the Rules of the United States District Courts for the Southern and Eastern Districts of New York and, accordingly, must be denied;

2. defendants' motion is also subject to summary denial for improperly advancing new facts, issues and arguments not previously presented to the Court;

3. if the Court grants reargument, it should uphold its prior decision because, *inter alia*:

a) the Court's reliance on the rationale of *van Emrik* was appropriate; and

b) defendants' belated, improper reliance on alleged bureaucratic difficulties in implementing this Court's initial order, misstates the operative facts, and also seems to be premised on the flawed notion that due process should be adjusted to dovetail with established administrative procedures rather than vice versa.

Attention will now be directed to the arguments of counsel, beginning with plaintiffs' claim that defendants' application for reargument and reconsideration is untimely.

DISCUSSION

A. *Defendants' Motion for Reargument is Untimely*

I. Date of Motion

On November 25, 1994, defendants filed a motion pursuant to Federal Rules of Civil Procedure "54(b) and 6(b) and Local Civil Rule 3(j), for reconsideration and reargument, on the grounds that in its Memorandum and Order dated September 30, 1994 . . . the Court overlooked material facts and controlling authority . . . ." (Defs.' Mot. at 1.)

II. Motion for Reargument and Reconsideration

Federal Rule of Civil Procedure 54(b) ("Rule 54(b)") provides, in relevant part, as follows:

> Any order or other form of decision . . . which adjudicates fewer than all the claims or the rights and

> liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Local Civil Rule 3(j) provides the following time frame and standards for a motion for reargument:

> A notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion . . . . There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked.

The Court notes that the standards controlling a motion for reargument pursuant to Local Rule 3(j) are the same as those for a motion to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e). *In re New York Asbestos Litig.*, 847 F. Supp. 1086, 1141 (S.D.N.Y. 1994) (citations omitted). To be entitled to reargument under either of these rules, the movant "must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion." *Id.* The Court first turns its attention to whether or not defendants' motion for reargument was timely filed.

III. Untimeliness of Defendants' Motion

Again, Local Rule 3(j) provides that a motion for reargument "shall be served within ten (10) days after the docketing of the court's determination of the original motion . . . ."

To be timely pursuant to Local Rule 3(j), defendants' motion for reargument should have been served on or before October 17, 1994[3]. As previously indicated, defendants' motion was not served until November 25, 1994. Therefore, it is clearly untimely. Defendants, conceding the same, "request that this Court, in its discretion, and pursuant to Federal Rule of Civil Procedure 6(b), grant them an extension of time and accept this motion for reconsideration despite its untimeliness under Local Civil Rule 3(j)." (Defs.' Mem. Supp. at 5.)

IV. Rule 6(b) Extension Request

Federal Rule of Civil Procedure 6(b) ("Rule 6(b)") provides as follows:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) . . . order the period enlarged if request therefor is made before the

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[3] The day of docketing, October 4, is not included in the computation of the ten (10) days. *See* Fed. R. Civ. P. 6(a) ("In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, . . ., the day of the act, event, . . . from which the designated period of time begins to run shall not be included.") Additionally, the following days are not included in the computation of defendants' ten (10) days: October 8 (Saturday); October 9 (Sunday); October 10 (Columbus Day). See id. ("When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.") Finally, because the last day of the allowable ten days, October 15, was a Saturday, the ten day period ran until the end of Monday, October 17. *See id.* ("The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . ., in which event the period runs until the end of the next day which is not one of the aforementioned days.")

> expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Rule 6(b) may furnish the basis for an enlargement of the ten (10) day provision of Local Rule 3(j). *See, e.g., Nysa-Ila Medical and Clinical Servs. Fund v. Salco Trucking Corp.*, No. 90 CIV 5949, 1993 WL 159962 (S.D.N.Y. May 11, 1993) (granting, pursuant to Rule 6(b)(1), and extension of time to move for reargument pursuant to Local Rule 3(j)); *Rudd Beverages, Inc. v. Anheuser-Busch, Inc.*, No. 86 CV 3227, 1990 WL 198732 (E.D.N.Y. Nov. 7, 1990) (denying request for Rule 3(j) extension because movant failed to demonstrate excusable neglect).

Because defendants did not request an extension of time to file their motion for reargument until well after the expiration of the ten (10) day period, *see supra* at 8-9, defendants have the burden of showing that their "failure to act was the result of excusable neglect." *See* Rule 6(b)(2). "The determination whether neglect is 'excusable' in a particular case rests with the sound discretion of the district court." *Davidson v. Keenan*, 740 F.2d 129, 132 (2d Cir. 1984) (citation omitted).

Against that background, the Court examines the explanation provided by defendants as to why they did not file their motion by October 17, 1994:[4]

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[4] Defendants indicate that, in order to be timely pursuant to Local Rule 3(j), their motion should have been served by October 10, 1994. (*See* Defs.' Mem. Supp. at 3.) Defendants' calculation of the ten (10) days, however, ignores the operation of Federal Rule of Civil Procedure 6(a); as previously indicated, to have been timely, defendants' motion for reargument must have been served on or before October 17, 1994.

1. They did not receive, "apparently due to the lateness of the postal service, the decision and order dated September 30, 1994 . . . until . . . October 7, 1994";

(Defs.' Mem. Supp. at 3.)

2. upon receipt of the September 30 Order, defendants did not "realize[] that the decision had failed to consider the complexities of Family Court practice in the five boroughs of New York City";[5]

(*Id.* at 4.)

3. they had to "receive authorization [to file their motion for reargument] from both the new Commissioner of the Child Welfare Administration and the new General Counsel for the Human Resources Administration." Because both the Commissioner and the General Counsel "had been on the job for only a few weeks at that time, [o]btaining appointments with them and allowing them time to absorb the issues and come to a decision necessarily took somewhat longer than it would have with a Commissioner and Counsel who had been in place for a more extended period and were not already being swamped with briefings and budget crises"; and

(*Id.*)

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[5] Defendants further state that it was not until they "attempted to put together the necessary step-by-step procedures for caseworkers to follow, [that] they realized" the Court's alleged oversight. (Defs.' Mem. Supp. at 4.)

4. "due to a combination of newly-announced trial schedules and an unexpected death in the immediate family, neither the assigned attorney in the Corporation Counsel's office . . . nor his supervisor . . . was able to work on this motion until another 10 days after the necessary permission was obtained."

(*Id.*)

As a preliminary matter, the Court finds no merit in the first two explanations proffered by defendants as to why they did not file their motion by October 17, 1994. Specifically, the Court opines that defendants' October 7 receipt of the Court's Order dated September 30 was probably *not* "due to the lateness of the postal service," as defendants suggest, (*id.* at 3), but rather was most likely because that Order was not docketed, and consequently was not mailed to the parties, until October 4, 1994. Again, however, the docketing date, not the date of the Order, begins the running for the ten day provision of Local Rule 3(j); therefore, defendants' receipt of the Order a week after the Court signed it did not prejudice defendants *vis-a-vis* the time frame for their filing a motion for reargument. In light of the foregoing, the Court finds no merit to defendants' suggestion that a tardy arrival of their copy of the Court's Order justified their untimely motion. Next, the Court notes that the second explanation proffered by defendants does not merit much discussion. Suffice to say, the Court does not find as "*excusable* neglect" Corporation Counsel's failure to evaluate the September 30 Order in a timely manner so as to make a timely motion for reargument.

The Court now addresses defendants' suggestion that a change in high-ranking New York City officials justifies the late filing of defendants' motion for reargument.

Accepting as correct defense counsel's assertion that it was required to receive authorization from both the Commissioner of the Child Welfare Administration and the General Counsel of the Human Resources Administration prior to filing a motion for reargument, there remains the fact that defense counsel could easily have requested, *prior* to October 17, additional time to file its motion. *See* Rule 6(b)(1). Defendants, however, offer no explanation as to why they did not request such an extension.[6] n6 See *Davidson v. Keenan*, 740 F.2d 129, 132 (2d Cir. 1984); *Turner v. Hudson Transit Lines, Inc.*, 89 Civ. 4252, 1991 WL 123966 (S.D.N.Y. July 2, 1991).

In light of the foregoing, the Court finds that the reasons advanced for defendants' failure to serve a motion for reargument by October 17, or at least to make a request for an extension by that date, do not constitute "excusable neglect" within the purview of Rule 6(b)(2).

B. Defendants Have Raised on Reargument Facts and Arguments not Previously Presented to the Court

Two of the defendants' three arguments proffered as justification for reargument and reconsideration were not previously presented to the Court, to wit, those that pertain to Social Service Law Section 383-b, and to bureaucratic complexities of Family Court practice in the City of New York. No legitimate explanation for that apparent oversight has been provided. Under the circumstances, it would be inappropriate to grant reargument even if, contrary to the

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[6] Similarly, the Court notes that although the "combination of newly-announced trial schedules and an unexpected death in the immediate family" of one of the defense attorneys, (Defs.' Mot. Supp. at 4), surely could have served as a basis for an extension request pursuant to Rule 6(b)(1), defense counsel simply chose not to make such a request.

fact, movants' application was timely. See, *e.g., Caribbean Trading and Fidelity Corp. v. Nigerian National Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir. 1990), citing *Schonberger v. Serchuk*, 742 F. Supp. 108, 119 (S.D.N.Y. 1990) ("A party making a motion for reargument may not, under Civil Rule 3(j), advance new facts, issues or arguments not previously presented to the Court.") *Woodard v. Hardenfelder*, 845 F. Supp. 960, 966 (E.D.N.Y. 1994) (A party requesting reargument "is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use Rule 3(j) to advance new facts and theories in response to the court's rulings.").

C. Had Reargument Been Granted, Court Would Have Adhered to its Original Decision

I. Introductory Comment

Defendants' motion for reargument was untimely, and improperly raised new facts and arguments in seeking to have the Court reconsider its decision of September 30, 1994. For those reasons, the Court has declined to grant reargument. Typically, of course, that would, and should, terminate the discussion. Here, however, the Court has considered the arguments of defendants on the merits. Given the importance of the subject matter, and that the arguments raised -- though generally new -- are germane, the Court believes that further analysis is worthwhile. Accordingly, the main arguments shall be addressed, *seriatim*.

II. Inapplicability of Social Services Law Section 383-b to Intrusive, Investigatory Medical Examinations Following a Family Court Act § 1024 Emergency Removal

Defendants maintain the Court overlooked New York State Social Service Law Section 383-b in rendering its decision of September 30, 1994.[7] It is the defendants' position that the very wording of that section requires the conclusion that it covers not only medical services which are necessary to address a medical need of the child following a Section 1024 emergency removal, but also any medical investigatory procedure -- no matter how invasive -- utilized in an effort to determine whether the subject child had been a victim of sexual abuse. In pursuing that argument further, the Court is advised that:

> " . . . Any physician who is asked to make an examination for the purpose of confirming or ruling out child abuse, especially sexual abuse, would certainly consider this to be 'medical' service. *See, e.g.*, the 1991 Guidelines for the New York State Department of Social Services and the Department of Health concerning specifically investigations of alleged sexual abuse in which it is stated that 'a complete physical examination should be done' . . . ."

Let us now analyze Section 383-b in the present context, including defendants' position on reargument that it should be read to embrace the gynecological examination of Sarah.

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[7] Defendants did not rely on Section 383-b as a justification for the examination of Sarah in their original motion papers. The only reference at that time to that section was in a footnote pertaining to the issue of qualified immunity. (*See* Defs.' Mem. Supp. Summ. J. Mot. at 32 n.9.)

Section 383-b, (entitled "Medical Treatment for Abused or Neglected Children; Consent of Commissioners") provides as follows:

> The local commissioner of social services or the local commissioner of health may give effective consent for medical, dental, health and hospital services for any child who has been found by the family court to be an abused child or a neglected child, or who has been taken into or kept in protective custody or removed from the place where he is residing, or who has been placed in the custody of such commissioner, pursuant to section four hundred seventeen of this chapter or section one thousand twenty-two, section one thousand twenty-four or section one thousand twenty-seven of the family court act.

Initially, it should be noted that Section 383-b pertains to children who have been placed in the protective custody of the Commissioner after a judicial adjudication of child abuse or neglect, as well as emergency situations in which children have been removed from their homes prior to such an adjudication with, and sometimes without, prior judicial approval. Sarah's removal falls within the last category. She was taken into protective custody by a caseworker, without parental consent or court authorization, based upon probable cause to believe that her return to her parents would place her in imminent risk of harm, coupled with insufficient time to seek court authorization.

Defendants' argument ignores the manner in which Sarah was placed into the Commissioner's custody, and the nature and purpose of the examination thereafter conducted. Implicit in their position is the notion that a "removal" is a "removal" for purposes of Social Service Law Section 383-

b. From that it would follow, for example, that whether a child is in foster care following an adversarial adjudication of abuse, *or* is in the Commissioner's temporary care based upon a unilateral field decision by a caseworker, is irrelevant for purposes of determining the nature and extent of medical services or procedures to which the child may, thereafter, be subjected under Section 383-b. Moreover, for a child removed under Section 1024, it would be of no significance -- if defendants' argument is sound -- whether the procedure under consideration consisted of taking a throat culture of a youngster with a raspy throat, or subjecting a child to a full gynecological examination for purely investigatory reasons.

The defendants' reading of Section 383-b, wholly independent of Family Court Act Section 1024, suggests some troubling scenarios. Consider, for example, defendants' reliance on the previously quoted excerpt from the 1991 New York State Department of Social Services' Guidelines which are attached as Exhibit A to the Hollander affidavit submitted in support of the motion for reargument. The portion quoted by defendants indicates that "A complete physical examination should be done . . . ." Significantly, the last paragraph of the "MEDICAL EXAMINATION" Section of the 1991 Guidelines, from which the above quotation was taken reads as follows:

> "When an examination is required and all attempts to gain the child's voluntary cooperation have failed the examination may be performed under general anesthesia. However the use of general anesthesia should be viewed as the exception, not the rule."

Few would question the legitimacy of a complete medical examination being conducted as part of an investigation of sexual abuse. Moreover, there may conceivably be

circumstances under which the child should be placed under general anesthesia to accomplish that result. However, it undermines the concept of "due process" to opine that a caseworker who has removed a child from her home pursuant to Section 1024 of the Family Court Act could thereafter consent to a gynecological examination of the child, *including the use of general anesthesia towards that end*, without any type of parental involvement or court participation. Yet, acceptance of the defendants' argument necessarily compels that conclusion.

An analysis of the purpose, and pre-conditions, for a Section 1024 removal further underscores the invalidity of the argument urged by defendants. The caseworker took possession of Sarah under Section 1024 of the Family Court Act. A removal under that Section is legislatively authorized solely in emergency situations where "there is not time enough to apply for an order [from the Family Court] under Section one thousand twenty two."[8] *See* Family Court Act Section 1024(a)(ii). If the very foundation for the child's removal was the existence of an emergency, how can that removal justify a non-emergency intrusive investigatory examination conducted after the

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[8] Family Court Act Section 1022 authorizes a Family Court judge to permit the temporary removal of a child from his or her home in an emergency situation, without parental consent, when "there is not enough time to file a petition and hold a preliminary hearing . . . ." That Section further provides, in subsection (c):

> The family court, before the filing of a petition under this article, may enter an order . . . authorizing a physician or hospital to provide emergency medical or surgical procedures, if (i) such procedures are necessary to safeguard the life or health of the child; and (ii) there is not enough time to file a petition and hold a preliminary hearing under section one thousand twenty-seven.

child is no longer in "harm's way"? In the Court's view, it can not.

Unlike a child who is placed in foster care with parental consent, or following an adjudication of neglect or abuse, a Section 1024 removal is meant to be a brief interim measure until such time as the parties can present their respective positions to a Family Court judge. Thus, a parent must be immediately advised of the right to challenge the removal at a Section 1028 hearing, which hearing, unless good cause is shown, *must* be held within three days of the parents' application for the child's return. *See* Family Court Act Section 1028(a). Moreover, a 1024 removal must be followed by the prompt filing of a petition by the child protective agency that took the child to assure that the court will be involved in the process should the parents not seek the child's return.

Defendants' sweeping interpretation of Section 383-b is premised on their reading of the statute, supplemented by reference to the previously mentioned "1991 State Guidelines."[9] In seeking reargument, defendants maintain that if the Commissioner lawfully has custody of a child -- whether pursuant to Section 1024 or any other section of Article 10 of the New York State Family Court Act -- Section 383-b gives her authority "to consent to *any* type of medical services, not just those that are medically 'indicated' for treatment purposes, but also those that may be medically necessary to rule out or confirm such conditions as battered child syndrome[10] or sex abuse, as

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[9] *See* text, 15, 17, 18, *supra*.

[10] The investigatory medical examination in *van Emrik* (discussed, *infra*) was to determine whether the thirteen month old baby had suffered prior fractures which, if found, would tend to confirm the suspicion that he was a battered child.

here" (emphasis added). (Defs.' Rep. Mem. at 5 n.1.) To read the statute so broadly in the present case would represent an unwarranted application[11] of the statute, given the Section 1024 character of the removal, and the highly invasive, investigatory nature of the medical procedure involved.

In sum, had defendants' present argument regarding Section 383-b been advanced initially, it would not have changed the conclusions set forth in the September 30, 1994 order.

III. Factual Matters Said to Have Been Overlooked by the Court

Accompanying defendants' motion for reargument, is the affidavit of Charles A. Hollander, the acting Deputy General Counsel for Family and Children Services in the Offices of Legal Affairs of defendant New York City Human Resources Administration. That affidavit contains information not previously presented by the movants,

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[11] A question about the constitutionality of Social Service Law Section 383-b was broached for the first time in Defendants' Memorandum in Support of Motion to Reconsider, at 10 n.4 thusly: "If, upon such reconsideration, this Court should be inclined to hold Social Service Law Section 383-b in contrary to the Fourth or Fourteenth Amendment, defendants respectfully request that a final determination on this point be deferred and that the Attorney General of the State of New York, as well as the parties to this case, be given an opportunity to brief the issue of the constitutionality of the state statute in this context."

The Court is not questioning the constitutionality of Section 383-b, although it has concluded that defendants' reliance on the statute, given the facts at bar, is misplaced. However, since defendants' motion for reargument has been denied, notice to the New York State Attorney General, and further briefing from the parties on this belatedly raised issue would serve no purpose and, thus, has not been ordered.

including statements about the *de facto* Family Court procedures for obtaining judicial authorizations under Article 10 of the Family Court Act within the City of New York.

Plaintiffs, rightfully so, object to this new factual matter being presented to the Court on a motion for reargument. Firstly, as plaintiffs note, Rule 3(j) provides that "no affidavits shall be filed by any party unless directed by the Court." No such direction was issued by the Court, nor was prior permission to file such an affidavit requested. Indeed, defendants have raised for the first time the impracticality of a caseworker obtaining judicial approval before ordering an intrusive investigatory medical examination of a child removed pursuant to Family Court Act Section 1024.

Notwithstanding the legitimacy of the plaintiffs' position that it is improper to present new arguments, based on new facts, in a reargument format, the Court will briefly discuss its prior ruling against the backdrop of what is represented to be the "actual Family Court Practice in New York City."

To place that discussion in context, however, a synopsis of certain portions of the September 30, 1994 decision is required. In that decision, the Court found that Sarah's removal constituted a seizure within the purview of the Fourth Amendment. (*See* Sept. 30, 1994 Order at 23.) That determination gave rise to the question of what standard should be applied in judging the constitutionality of a child's pre-trial removal from his or her home in instances of suspected child abuse. *Id.* at 24. Must probable cause be present, or will some lesser standard -- such as reasonable suspicion -- suffice? Is a warrant always required?

Given the virtual absence of appellate authority directly on point, the Court considered a host of factors in

endeavoring to fashion appropriate answers to those questions, including the likely effects that the various alternative standards -- and a warrant requirement -- would have on society's efforts to address the child abuse and neglect problem.[12] As a part of that process, the Court observed

> throughout this decision, the word "warrant" and the term "judicial authorization" will be used interchangeably as synonyms, with the understanding that a judicial authorization in the present context, and thus a "warrant," might consist of, inter alia an oral court order given over the telephone, followed by a confirmatory written order. Parenthetically, such a practice was often utilized -- with the telephone call being taped -- in the Family Court of Suffolk County for Section 1022 applications under the Family Court Act . . . when the author of this opinion served in that court in the early to mid-1980s.

Id. at 24 n.7.

In response to that footnote from the original decision, defendants now proffer that

> as shown by the Affidavit of Charles A. Hollander . . . it is never possible in New York City to obtain judicial authorization by telephone, or outside limited business hours on weekdays, by any method at all. Thus, the actual burdens on the government in carrying out its mandates on child abuse investigations are far greater

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[12] The Court concluded that "probable cause" is the applicable standard under the Fourth Amendment, and that a "warrant" -- in the sense of prior written or oral judicial authorization -- is required for non-emergency search or seizure. (Sept. 30, 1994 Order at 30.)

than the Court's analysis in the September 30th decision assumed.

(Defs.' Mem. Supp. at 2.)

Firstly, it should be noted that the footnote targeted by defendants -- equating the word "warrant" with the term "judicial authorization" -- pertains solely to the warrant requirement of the Fourth Amendment. Contrary to defendants' belief, (*id.* at 5-6), it is not meant to relate to the discussion of plaintiffs' multiple claims predicated on the Fourteenth Amendment.[13] In that regard, the Court found that due process requires -- as a pre-condition to the type of invasive, purely investigatory examination conducted here -- that the Commissioner of Social Services obtain judicial authorization for the procedure, issued after both notice, and an opportunity to be heard, has been furnished to the non-consenting parents. (Sept. 30, 1994 Order at 19-21.)

Defendants, as noted previously, have voiced concern about their ability to establish telephone contact with Family Court judges in the five burroughs outside of

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[13] Defendants' misperception is traceable to the introductory clause of the footnote which -- in explaining that the terms "warrant" and "judicial authorization" should be treated as synonymous -- reads "throughout this decision," rather than throughout this portion of the decision. Be that as it may, however, it should be clear that footnote 7 does not modify, or otherwise affect, the Court's specific holding that "due process" requires judicial authorization for invasive, purely investigatory medical examinations, given after the parents have been notified and provided with an opportunity to be heard. *See, e.g.,* Sept. 30, 1994 Order ("[Defendants'] . . . argument trivializes the constitutional implications of the State subjecting a person to an investigatory, intrusive medical examination without notice, and an opportunity to be heard, within the context of a judicial proceeding."); *see also id.* at 19-21.

regular business hours. Presumably, the perceived administrative burdens are magnified when the court's Fourteenth Amendment concerns are factored into the equation. For that reason, the next subject to be discussed will be the claimed burden associated with adjusting existing procedures to dovetail with constitutional requirements.

Defendants have advised the Court that for the period from July 1993 to June 1994 nearly 3400 reports of alleged child sexual abuse were received by the City, with approximately 42% of that number being received at night, or on weekends or holidays. Moreover, each report typically involved more than one child. (Defs.' Not. Mot. Ex. A at 4-5 (¶ 12).) Those numbers are certainly substantial. If parental and court involvement is a precondition to a child being subjected to a purely investigatory, invasive medical examination, presumably more children would be placed in temporary foster care, and as well as increasing the periods of separation for the involved children from their parents would increase.

However, it appears likely that the number of children who would be prospectively impacted by this Court's decision would fall far short of the number of reports received in any given year, because:

1. many reports may be summarily determined to be unfounded following an interview with the child and his or her parents;

2. some parents may be expected to consent to a medical examination if assured that a family member or other loved one may be present to comfort the child, and in view of the

fact that a failure to consent could result in the child being in foster care for a few days;[14] and

3. in some instances, the nature of the child's physical complaints and/or other information may not only justify an emergency removal, but may also indicate that an *immediate* medical examination is required to address an apparent or probable emergency medical need of the child.

In sum, the anticipated administrative problems cited by defendants, while significant, do not appear to be of the magnitude or character suggested. In any event, juxtapositioned against those concerns are fundamental constitutional rights. As noted in *Doe v. Renfrow*, in another context "it does not require a constitutional scholar to conclude that a nude search of a thirteen-year old child is an invasion of a constitutional right of some magnitude. More than that: it is a violation of any known principle of human dignity." 631 F.2d 91, 92-93 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022, 101 S. Ct. 3015 (1981). The resulting tension between those competing interests would have resolved by the Court in favor of the Tenenbaums even if, contrary to the fact, the information presented by defendants in support of their current motion had been made available in the first instance. Which is to say, had the supposedly "overlooked facts" been provided initially,

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[14] The statutory scheme embodied in Article 10 of the New York State Family Court Act is geared to provide expedited responses to problems associated with suspected cases of child abuse and neglect. In those instances in which a parent declines to consent to an invasive, investigatory examination of his or her child, a court review -- with an opportunity for the parent to be heard -- could be readily conducted, possibly as part of a Section 1028 hearing. That section, it will be recalled, mandates that a hearing must be commenced within three days of a parent's demand for the return of a child following an emergency removal.

the order of September 30, 1994 would not have been substantively different than as issued.

IV. Applicability to Present Case of Rationale Espoused in *van Emrik v. Chemung Count Dep't of Social Servs.* Regarding Investigatory Examinations of Children by Public Officials

The last major ground urged by defendants in seeking reargument is that the Court misunderstood Chief Judge Newman's comments regarding the constitutional implications of investigatory medical procedures ordered by state officials during child abuse investigations. In support of that argument, defendants underscore that *in van Emrik*, the caseworker had not taken the child into protective custody before ordering the investigatory long-bone x-rays, and issued the order based upon Social Service Law Section 416 which permits persons required to report cases of suspected child abuse to authorize x-rays "if medically indicated." In contrast, Sarah had been taken into custody before she was subjected to an investigatory examination and defendants seek to justify their conduct under Social Service Law Section 383-b, not Section 416 of that statute.

The distinctions between *van Emrik* and the present case are noteworthy. The question remains, however, whether those distinctions render the following excerpt from *van Emrik* irrelevant for present purposes:

> We believe the Constitution assures parents that, in the absence of parental consent, x-rays of their child may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents and an opportunity to be heard, that grounds for such an

examination exist and that the administration of the procedure is reasonable under all the circumstances. *Cf. United States v. Allen*, 337 F. Supp. 1041 (E.D. Pa. 1972) (requiring search warrant for x-ray of criminal suspect); *State v. Mabon*, 648 S.W.2d 271 (Tenn. Crim. App. 1982) (same); *see also United States v. Ek, 676 F.2d 379, 382 (9th Cir. 1982)* (permitting x-ray incident to border detention only on "clear indication that suspect is concealing contraband"). Such notice and hearing will afford the judicial officer an opportunity to assess the evidence prompting the state official's request and to ascertain from the parents pertinent facts bearing on the appropriateness of the procedure. For example, inquiry might disclose that sufficiently thorough x-rays had recently been taken and were readily available for inspection or that the extent of radiation contemplated posed an unusual risk to the particular child.

In the Court's view, the rationale embodied in *van Emrik* bears directly on plaintiffs' constitutional claims. The basis for that conclusion is threefold:

1. A perusal of the facts in *van Emrik* indicates that the caseworker in that case had probable cause to effect a Family Court Act Section 1024 removal. Indeed, later on the same day that the x-rays were taken, a court ordered emergency removal was effected, apparently with no changed circumstances having occurred in the interim. It appears that the investigatory x-rays were negative. Of course, compliance, or the lack of compliance with a state statute is not the yardstick against which to assess a claimed federal constitutional violation. Yet, it is interesting that the caseworker in *van Emrik* could just as well have invoked Sections 1024 and 383-b,

instead of Social Service Law Section 416, as the predicate for her actions. Clearly, the character of her incantations is not a ground to ignore the insightful analysis in that decision in evaluating the due process claims of the Tenenbaums;

2. Based on the facts and arguments presented by the parties with respect to the summary judgment motions, the gynecological examination of Sarah -- like the examination of the child in *van Emrik* -- was not conducted "to provide medical treatment to the child, but to provide investigative assistance to the caseworker." *Id.* at 867; and

3. Here, as in *van Emrik*, time permitted parental and judicial involvement prior to the investigatory medical examination being conducted.

In conclusion of this point, *van Emrik*, although distinguishable, is nonetheless germane to the issues framed in the case at bar.

CONCLUSION

Defendants' motion for reargument was untimely, and presented facts and issues not originally advanced for the Court's consideration. For those reasons, the motion was denied. Nonetheless, given the importance of the subject matter, a number of defendants' arguments have been discussed. In each instance, however, those arguments -- although well presented -- would not have changed the substance of the Court's original order of September 30, 1994.

SO ORDERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of December one thousand nine hundred and ninety-nine.

MARC TENENBAUM, et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

NAT WILLIAMS, et al.,

Defendants-Cross-Appellees.

Dkt No: 97-9488 (L), 97-9554 (X)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Hammons, Meyers and New York City.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
KAREN GREVE MILTON,
Acting Clerk
/s/ Beth J. Meador
(Administrative Attorney)

Supreme Court, U.S.
FILED
MAR 2 8 2000

(2)

No. 99-1419

In The

Supreme Court of the United States

NEW YORK CITY, MARVA LIVINGSTON HAMMONS, as Commissioner of Social Services of the City of New York, and CLAUDE MEYERS, as Deputy Commissioner of Social Services of the City of New York,

Petitioners,

-against-

MARC TENENBAUM and MARY TENENBAUM, individually and on behalf of SARAH TENENBAUM, an infant,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS AND OF THE CASE 1

Procedural History 1

Facts 3

REASONS WHY THE PETITION SHOULD BE DENIED 11

A. The Petition presents questions of fact, which are not appropriate for this Court 11

1. The removal of Sarah Tenenbaum from her parents 11

2. The search of Sarah Tenenbaum's body 13

B. Neither the decision below nor the record raises the questions presented 15

1. The removal of Sarah Tenenbaum from her parents 15

2. The search of Sarah Tenenbaum's body 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 20

Armstrong v. Manzo, 380 U.S. 545 (1965) 19

Catanzaro v. Weiden, 140 F.3d 91 (2d Cir. 1998) 11

Chalkboard, Inc. v. Brandt, 902 F.2d 1375 (9th Cir. 1990) 11

Croft v. Westmoreland County, 103 F.3d 1123 (3rd Cir. 1997) 16

Davis v. United States, 417 U.S. 333 (1974) 20

Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1976) 17

Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) 11, 17

Malik v. Arapahoe County Department of Social Services, 191 F.3d 1306 (10th Cir. 1999) 16

Morris v. Dearborne, 181 F.3d 657 (5th Cir. 1999) 16

Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991) 11

Monell v. Department of Social Services, 436 U.S. 658 (1978) 1

Santosky v. Kramer, 455 U.S. 745 (1982) 16

Stanley v. Illinois, 405 U.S. 645 (1972) 16

van Emrik v. Chemung County Department of Social Services, 911 F.2d 863 (2d Cir. 1990) 20

Vinson v. Campbell County Fiscal Court, 820 F.2d 194 (6th Cir. 1987) 16

Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000) 17

Zinermon v. Burch, 494 U.S. 113 (1990) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 1
N.Y. Fam. Ct. Act § 1022(a) 9
N.Y. Fam. Ct. Act § 1027(a) 9
N.Y. Soc. Serv. L. § 423 4
N.Y. Soc. Serv. L. § 424(11) 5

OTHER AUTHORITY

New York State Central Register Reporting Highlights 1974-88 5

STATEMENT OF FACTS AND OF THE CASE

Procedural History

Petitioners' statement of facts, which is very much skewed toward their point of view, neglects to inform this Court that the facts are very much in dispute because of the procedural posture of the case. Indeed, Petitioners have entirely omitted the procedural posture of the case from their discussion.

Respondents Marc, Mary, and Sarah Tenenbaum, who were the plaintiffs in the District Court, sued the City of New York and several of its child welfare employees and officials under 42 U.S.C. § 1983. The Tenenbaums claimed that the defendants violated their constitutional rights based upon two separate incidents. First, defendants removed five-year-old Sarah from the custody of her parents shortly before noon on January 9, 1990. (A12)[1] Second, defendants subjected Sarah to a search, in the form of an intrusive gynecological examination, on the afternoon of the same day. (A12) Defendants did not seek or obtain court orders for either of those actions. (A4)

The District Court stayed discovery on plaintiffs' claims against the City and its Commissioners, the so-called "Monell claims." (A63) See, *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Discovery proceeded only as to the individual defendants – child welfare caseworker Veronica James and her supervisor Nat Williams, who are not parties in this Court. At the conclusion of

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[1] "A" refers to pages in the Appendix to the Petition for a Writ of Certiorari.

discovery, all defendants moved for summary judgment, despite the absence of discovery as to the City of New York and its Commissioners. (A63)

The District Court granted the defendants' motion for summary judgment on all of the plaintiffs' claims regarding defendants' removal and detention of Sarah Tenenbaum. (A13) The court found that the individual defendants were entitled to qualified immunity on the claims regarding the search of Sarah's body. (A13) However, the court denied the motion as to the plaintiffs' claims against the City and Commissioners, and directed that that portion of the lawsuit proceed. Contrary to Petitioners' statement (P8)[2], the District Court did *not* grant summary judgment in favor of plaintiffs on any issue. (A13)

When the Tenenbaums sought discovery on the *Monell* claims regarding the search of Sarah's body, Petitioners stipulated that they have a policy of conducting searches of children – in the form of medical examinations – for purely investigative purposes. (A14, A24) Thus, the City conceded liability on the search of Sarah, at least for the purposes of the present litigation. The case went to trial on damages only. (A14)

On appeal, the Second Circuit affirmed the District Court on all questions involving the search of Sarah Tenenbaum's body. (A5) The Second Circuit reversed the District Court's grant of summary judgment to defendants on plaintiffs' claims regarding the removal of Sarah Tenenbaum from her parents. (A5) The Second Circuit

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[2] "P" refers to pages in the Petition for Writ of Certiorari.

ruled that the individual defendants had qualified immunity on the claims that they violated the Constitution in removing Sarah from her parents without due process of law. (A5) With regard to the Tenenbaums' claims against the City and its Commissioners for the unconstitutional separation of the parents and child, the Second Circuit found that "a properly instructed jury could conclude that at the time the caseworkers decided to remove Sarah, there was reasonably sufficient time, entirely consistent with Sarah's safety, to seek a court order." (A19) Accordingly, the Second Circuit remanded, for further proceedings, the Tenenbaums' claims against the City and Commissioners regarding the removal of Sarah. (A44) The Second Circuit has stayed its mandate pending the outcome of the case in this Court.

Thus, there are two separate claims: the claims against the City for the search of Sarah Tenenbaum, which have been litigated to conclusion, and the claims against the City for the removal of Sarah from her parents, which are still in the discovery stage.

Facts

Employees of Petitioners City of New York, Hammons, and Meyers removed Sarah Tenenbaum, a developmentally delayed five-year-old girl (A6), from her parents and subjected her to a body cavity search (A12) as a result of a discredited allegation (A12) against her father only, made by an inexperienced teacher. Sarah was removed, not to protect her from immediate danger (A28), but in order to conduct an investigatory search (A27) of her most private body parts. The course chosen by Petitioners

– having a stranger summarily remove the girl from school and take her to a city hospital emergency room – was the most traumatic method of obtaining information (see A27), the most intrusive and least observant of constitutional rights (see A26), and was nothing more than a shocking display of raw governmental authority. Acting pursuant to standard City procedure (A11), the City employee who decided to remove and search Sarah, and the caseworker who carried out the removal and search, did not seek or obtain judicial approval for either the removal or the search (A12), although they had ample time to do both. (A19, A28)

The events began on Friday, January 5, 1990, when the New York State Central Register of Child Abuse and Maltreatment (the "Register") received a telephone complaint of suspected child abuse regarding plaintiff Sarah Tenenbaum, then five years old, from Susan Raiten, a guidance counselor at Sarah's school. (A7) The same day, the Register faxed a written version of the complaint to New York City's Child Welfare Administration ("CWA") (A7). The written document said that "Sarah is speech and language delayed. Sarah unable to stay awake during the day. Ch[ild] is nervous and withdrawn. Ch[ild] is afraid of fa[ther]. Fa[ther] hurts her vaginal area at night." (A7) The Register designated plaintiff Marc Tenenbaum, Sarah's father, as the alleged perpetrator. Sarah's mother, plaintiff Mary Tenenbaum, was not listed as a perpetrator. (A90)

N.Y. Soc. Serv. L. § 423 requires that every complaint of suspected child abuse or maltreatment which the Register receives must be fully investigated. Defendant Nat Williams, a supervisor with CWA, was assigned to the

Tenenbaum investigation, and he in turn assigned defendant Veronica James to carry out the investigation. (A7) Neither Williams nor James are parties in this Court.

Williams and James had many reasons to treat the report with a degree of skepticism. In the State of New York, approximately two-thirds of the complaints which the Register receives turn out, upon investigation, to be completely groundless or "unfounded," i.e., not supported by any credible evidence whatsoever. N.Y. Soc. Serv. L. § 424(11); *New York State Central Register Reporting Highlights 1974-88*, Table 10 (reproduced in Joint Appendix to Second Circuit, pp. A.171-73) Moreover, they did not know whether the informant was reliable.

Contrary to the implication of Petitioners' statements (P5-6), Sarah's problems in school were a direct result of her developmental delays and not of any sexual abuse. Sarah's teacher Mary Murphy, a second-year teacher, was not sufficiently experienced to recognize that Sarah should never have been placed in a mainstream kindergarten class or to realize that that error was the cause of her problems in school.

If Williams was skeptical, he concealed his reservations from James. When he assigned the Tenenbaum complaint to James, Williams told her to investigate Marc Tenenbaum for possible sexual abuse of his daughter, but instructed her to conceal that allegation from both of the Tenenbaums. (see A8)

On Friday, January 5, 1990, Williams sent caseworker Tom O'Connell with James to the Tenenbaum home. (A8) Both of the Tenenbaums were home, as were Sarah and

her younger brother Aaron. (A8) James told the Tenenbaums that CWA had received a report that Sarah was sleeping in school and was developmentally delayed. (A8) Marc Tenenbaum explained that the family had an ongoing dispute with the school over plans for Sarah's education. (A60) The Tenenbaums had initially questioned, and recently vetoed, the school's plans to transfer Sarah to a Special Education class in a different school. Moreover, concerned about Sarah's development, the Tenenbaums had obtained comprehensive evaluations and treatment for Sarah's developmental problems at Maimonides Hospital. (A60) Those problems included elective mutism, the inability to speak outside the home. (A6)

The Tenenbaums thus definitively refuted any charges that they were neglecting Sarah's educational or developmental problems, specifically disproving the school's charges. (A60) In addition, the Tenenbaums demonstrated a motive on the part of school staff to misjudge the family, whom the school found insufficiently deferential. (A60)

The Tenenbaums informed James about the children's health and, when requested, signed releases for their doctors' records. (A8) They gave James a tour of the house. James found the house neat and well cared for. (A8)

Although James had the power to remove children in emergency situations, she left Sarah at home when she departed from the Tenenbaum home (A8), obviously concluding that Sarah was in no immediate danger. Despite

the availability of emergency caseworkers, CWA took no further action over the weekend. (A9)

On Monday, January 8, 1990, James went to Sarah's school (A9) and learned for the first time that the person who had allegedly heard of the sexual abuse from Sarah was not Raiten but Mary Murphy, Sarah's kindergarten teacher. (A9) Murphy reiterated what had happened the week before: from Sarah's nodding, in response to a series of leading questions, Murphy felt that she had ascertained that Sarah was being bothered by something at home related to her father. (A6, A9) Sarah had also been playing with a doll; and when Murphy approached her to ask her where, on the doll, Sarah was being hurt, Sarah pointed to the doll's groin area. (A6) Not once did Sarah utter a word to Murphy. (A6)

By the time James came to the school for investigation, she knew that Sarah suffered from elective mutism. (See A7) That fact alone should have caused James to question the veracity of Murphy's claim that Sarah had "told" Murphy about sexual abuse on the previous Friday. Moreover, James knew or should have known that young children are extremely suggestible and, in responding to leading questions, are likely to give answers that they believe the adults want to hear.

James then questioned Sarah about the alleged abuse. (A9) Sarah did not answer any of her questions. (A9) In fact, she did not speak to James or Murphy. (A9) Undeterred, James asked Murphy to recreate the events of the prior Friday and to show James exactly what Murphy had done to obtain answers from Sarah. (A9) The rerun of the experiment yielded results contrary to those that Murphy

had supposedly observed on Friday. When Murphy asked Sarah, in front of James, whether Sarah's father touched her near the vagina and hurt her, Sarah shook her head "No." (A9) Thus, James had even less reason to believe that Sarah had been abused than she had before the visit. (A9)

Although the Tenenbaums had signed releases, James and Williams made no attempt to speak to Sarah's pediatrician about possible abuse. Nor did they examine Sarah's school records, which documented her developmental delays. Instead, when James advised Williams what had happened at school, including the fact that Sarah had responded negatively to questions about sexual abuse (A9), Williams told James to remove Sarah from school the next day (Tuesday) and bring her to Coney Island Hospital to be examined for sexual abuse. (A10)

While Williams instructed James on Monday afternoon to remove Sarah. (A10), neither Williams nor James saw any need to proceed with the removal that afternoon, from either the school or home, nor to have Petitioners' Emergency Children's Services unit make a removal in the evening or nighttime. (A10) Petitioners misstate the facts in claiming that Williams waited until Tuesday to make the decision to remove Sarah (P21) and that the situation changed between Monday and Tuesday. (P21)

While Petitioners argue that when the decision was made is unclear and not relevant (P22 n1), the testimony of both Williams and James shows that the decision was made on Monday afternoon. (A10) Although Petitioners argue that it takes more than a day to get a court order

(P28), the City has conceded that they could get an order the same day (A11 n7), and Williams knew that. (A11)

Petitioners' attempt to justify Williams' decision (P20-22) has required them to invent facts which do not exist. They seek to justify his delay in acting on an "emergency" by claiming that he was waiting for a call from the parents. (P21) They seek to buttress his decision by claiming that an important element in that decision was his perception "that the Tenenbaums took the allegation of sex abuse so lightly that they did not even call him." (P22) Petitioners completely omit the fact that, as both sides admitted below, the Tenenbaums were not aware of any such allegation. (A8) The caseworkers who had the sole contact between CWA and the Tenenbaums, at a visit to the home on Friday night, had concealed from the Tenenbaums, at Williams' explicit instructions, all information that the report concerned alleged sexual abuse. (A8) Thus, Petitioners seek to justify Williams' actions by the failure of the Tenenbaums to respond to information that Williams had withheld from them. (P21, A10 n4)

Williams did not seek judicial authorization prior to removing Sarah, despite the fact that New York law requires CWA to do so. N.Y. Fam. Ct. Act §§ 1022(a); 1027(a). Moreover, Petitioners concede that those steps can be accomplished in one day. (A11 n7) Despite constitutional and statutory requirements to do so, Williams stated that he had rarely gone to court before removing a child. (A11) City policy was to remove children first, and seek court orders later.

On Tuesday morning, January 9, 1990, James removed Sarah from school. (A12) James took Sarah to Coney Island Hospital, where they waited three or four hours because James, in accordance with CWA practice, had not made an appointment. (A12) Finally, Sarah was seen and subjected to two examinations, one by a pediatrician, the other by a gynecologist. Sarah was stripped and subjected to a body cavity search, including an inspection of her vagina and surrounding area, as well as penetration of her vagina and anus with Q-tips. (A12) That was the first time in her life that Sarah had undergone a gynecological exam. (Mary Tenenbaum Trial Transcript, p. 10, reproduced at Joint Appendix in Second Circuit, p. A.532) No evidence of sexual abuse was discovered. (A12)

Several hours after Sarah was removed from school and while she and James were at the hospital, Williams contacted Mary Tenenbaum. (A12) Mrs. Tenenbaum left her job immediately and went to Williams' office, stopping only to call her husband. (A12)

Williams stated that CWA had taken Sarah and that the Tenenbaums would not get Sarah back. (A62) When Mary Tenenbaum defended her husband, Williams told her that she was an unfit mother. (A62)

Eventually, James returned from Coney Island Hospital with Sarah and the doctors' report. (A62) Williams reviewed the report and decided not to make a charge of sexual abuse. (A62) In fact, the City determined that the allegations of sexual abuse were "unfounded," i.e., that there was no credible evidence to support them. Between

7:30 and 8:30 PM, Williams released Sarah to the Tenenbaums. (A12)

The City conceded that it had a standard practice of performing medical examinations on children whom they had removed, to investigate for possible abuse, without seeking prior approval from a court. (A11, A24)

REASONS WHY THE PETITION SHOULD BE DENIED

A. The petition presents questions of fact, which are not appropriate for this Court.

1. The removal of Sarah Tenenbaum from her parents

The first question for review, when stripped of all the excess verbiage, is: was Sarah Tenenbaum's situation an emergency? As Petitioners themselves stated, "The relevant question is whether there is an 'emergency' at the time the decision is made to remove a child." (P22-23) That question is one of fact, and is therefore inappropriate for this Court. *Jordan v. Jackson*, 15 F.3d 333, 347 (4th Cir. 1994): "Whether the child is subject to imminent danger to his life or is in imminent danger of irreparable injury to his health is a sharply focused factual determination . . . "; *Catanzaro v. Weiden*, 140 F.3d 91, 94 (2d Cir. 1998): "the existence *vel non* of an emergency is an issue of material fact . . . "; accord, *Miller v. Campbell County*, 945 F.2d 348, 353 n. 8 (10th Cir. 1991); *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir. 1990): the question as to whether an emergency existed, which vitiated the pre-

deprivation hearing requirement of due process, could not be resolved on summary judgment.

A close reading of the petition for certiorari itself demonstrates the fact-sensitive nature of this particular case. Petitioners cannot even agree among themselves as to what constitutes an emergency. They conceded at oral argument in the Second Circuit that they could have gotten a court order the same day. (A11 n7) Indeed, Williams had testified that he could file papers in court, present a case to a judge, and obtain judicial approval (or disapproval) within one day. (A11, A61, A68) Nevertheless, Petitioners now say that they would have to wait several days to get a court order, and that would be harmful to children. (P28) That assertion is belied by the record below and is simply a scare tactic.

The law is clear that when the government seeks to deprive an individual of liberty, the government must provide due process of law in the form of a pre-deprivation hearing. The state must provide a pre-deprivation hearing, i.e., a hearing before the removal of the child, whenever the state "feasibly can provide" one. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Indeed, Petitioners concede that only in " 'emergency' circumstances" may the City act "without either parental consent or a prior court order." (City Reply Brief to Second Circuit p. 36)

In arguing that the "emergency" still existed on Tuesday even if they did not make the removal on Monday (P21), Petitioners miss the point of the Second Circuit's decision: the decision not to remove Sarah on Monday gave them sufficient time to provide a pre-deprivation hearing, i.e., to go to court to seek an order.

Petitioners' attempt to justify the decision to seize Sarah (P20-21) has required them to invent facts. They seek to justify Williams' delay in acting on an "emergency" by claiming that he was waiting for a call from the parents. (P20-21) They also seek to buttress Williams' decision by claiming that he had more information on Tuesday, which constituted an important element in his decision, to wit: his perception "that the Tenenbaums took the allegation of sex abuse so lightly that they did not even call him." (P21) Petitioners completely omit the fact, which was admitted by both sides, that the Tenenbaums were never aware of any such allegation.

The procedural protections afforded by Due Process clause of the Fourteenth Amendment are not for the benefit of parents only. Most importantly, those procedural protections benefit the children. Contrary to Petitioners' assertions, removing children from parents is not a safer course. As the District Court found, Sarah was "abused" by the examination and suffered trauma. The same was true of her removal from school and home.

Removing a child without due process is not a "safer course." The District Court found that Sarah suffered psychological injury as a result of the examination. (A27) The same was true of her removal from school and parents.

2. The search of Sarah Tenenbaum's body

Petitioners now claim that their search of Sarah Tenenbaum's body, in the form of a gynecological examination, was justified under the Constitution because it "was

not merely forensic but was also medical" (P26), i.e., because Sarah might have needed medical treatment. (P25, P26) That argument must fail for two reasons.

First, Petitioners never claimed such a justification in the District Court. (A101) On the contrary, as the District Court found, "no claim has been advanced, directly or indirectly, that the examination was related to necessary medical care or treatment of the child. . . . " (A101) Rather, the exam was "solely for investigative purposes" (A74); "Williams unambiguously so testified." (A27) In claiming that the exam was for medical as well as investigative purposes, Petitioners impugn the motives of their own employee who ordered that exam. They also have tried to invent facts that do not exist.

Second, Sarah's parents were perfectly capable of obtaining medical treatment for her if she needed it. Her mother, a nurse, would have been a far better person to accompany Sarah than defendant Veronica James, who was a stranger to the child. Likewise, it would have been better for Sarah to be examined by her own pediatrician, whom she knew and trusted, than by a strange male doctor. Finally, if Sarah had actually needed medical treatment, Petitioners' four-day delay in obtaining that treatment was all the more inexcusable.

Petitioners' closing argument, that they must choose between performing examinations or not protecting children, is false and confuses the issue. (P30-31) The choice is not theirs to make, but rather lies in the sound judgment of a neutral magistrate. Providing due process of

law to all persons, is the best way to safeguard individuals from overzealous investigators and the resultant disruption of family autonomy.

B. Neither the decision below nor the record raises the questions presented.

1. The removal of Sarah Tenenbaum from her parents

Petitioners claim that they removed Sarah because the situation was an emergency, or rather that their employee Nat Williams "reasonably perceived" the situation as an emergency. (P21) The facts do not raise that issue.

The only Petitioners here are the City of New York and its Commissioners – Marva Hammons and Claude Meyers. None of the Petitioners were personally involved in the removal of Sarah Tenenbaum. The individuals who were personally involved – caseworker Veronica James and supervisor Nat Williams – are not part of the case. The Second Circuit ruled that both of them were entitled to qualified immunity because the law was not clearly established at the time. (A22)

The only remaining claims are plaintiffs' claims that the City and its Commissioners had an unconstitutional policy or practice of removing children from their parents without providing pre-deprivation hearings, and that the City implemented that policy routinely, whether or not the City had sufficient time to provide a pre-deprivation hearing, i.e., time to go to court and seek a court order to

remove the children. The Second Circuit found that policy or practice to be unconstitutional. (A24)

The Second Circuit's decision is consistent with clearly established law. This Court has repeatedly upheld the requirement that the state provide notice and an opportunity to be heard when it seeks to interfere with the parent-child relationship. Thus, in *Stanley v. Illinois*, 405 U.S. 645, 658 (1972), this Court held: "parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." And in *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982), this Court likewise held: "When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."

Nor is there a split in the circuits. On the contrary, the Courts of Appeals which have considered the question have all held that "a parent has a liberty interest in familial association and privacy that cannot be violated without adequate pre-deprivation procedures." *Malik v. Arapahoe County Department of Social Services*, 191 F.3d 1306, 1315 (10th Cir. 1999). Accord, *Wallis v. Spencer*, 202 F.3d 1126, 1137 (9th Cir. 2000): "the Fourteenth Amendment[ ] guarantee[s] that parents and children will not be separated by the state without due process of law except in an emergency"; *Croft v. Westmoreland County*, 103 F.3d 1123, 1125 (3rd Cir. 1997): "The Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requirements of procedural and substantive due process"; *Morris v. Dearborne*, 181 F.3d 657, 669 n. 7 (5th Cir. 1999); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 200 (6th Cir. 1987): "plaintiff's interest

in the physical custody of her children could not be terminated without compliance with the requirements of due process"; *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994): "Where the state seeks to interfere with . . . parental rights, its action must satisfy the procedural strictures of the Due Process Clause."

In this Court, Petitioners do not challenge the Second Circuit's ruling that their policy was unconstitutional. Instead, Petitioners claim that their employees reasonably believed that the situation involving Sarah was an emergency, thus justifying their failure to provide Sarah and her parents with pre-deprivation hearing. (P21)

The Tenenbaums agree that, in emergency situations where there is not sufficient time to provide a pre-deprivation hearing, the State may satisfy requirements of procedural due process by providing a prompt post-deprivation hearing. See, e.g., *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1976). However, that issue is not before this Court. Petitioners have already conceded that their employees had sufficient time to provide the Tenenbaums with due process of law. (A11 n7) The claim now set out in the petition for certiorari that those employees lacked sufficient time to seek a court order was not raised below, and is consequently not appropriate for review by this Court. Their decision to remove Sarah, which was made on Monday but not implemented until Tuesday, gave them sufficient time to go to court to seek an order. (A19)

Petitioners curiously assert that "[i]t is disingeuous of the majority in the Court of Appeals to suggest that the decision [to remove Sarah] could have or should have been made on Monday." (P21) The Second Circuit did not

"suggest" that Petitioners could have or should have decided to remove Sarah on Monday. Rather, the Court found that the evidence would support the conclusion that Petitioners' employee Nat Williams actually did make the removal decision on Monday. (A10)

Petitioners have already admitted that removing children without orders was their standard practice. At oral argument in the Second Circuit, counsel for Petitioners stated categorically that their caseworkers "do it routinely. That is the policy." (A11)

Although they fail to raise their key argument explicitly, what Petitioners implicitly seem to be claiming is that they should never have to provide due process of law in connection with the removal of children from parents, i.e., that they should not have to provide either pre-deprivation hearings or post-deprivation hearings. The suggestion of that position is contained in Petitioners' statement that "[i]t falls upon the child welfare workers to effectuate the appropriate balance between these competing interests [of upholding the constitutionally protected interest in the family relationship and of protecting children from abusive parents]." (P20-21)

Respondents submit that striking an appropriate balance between competing interests is not an appropriate function of a child welfare worker. On the contrary, that is the basic function of the judiciary, the end toward which due process of law strives. Due process of law, in the form of notice and an opportunity to be heard, guarantees that such a decision will be made by a neutral magistrate, upon consideration of all relevant facts and

arguments. See, *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

2. The search of Sarah Tenenbaum's body

Petitioners' second question is based upon the purported factual premise that the medical examination of Sarah Tenenbaum was "objectively medically indicated." The facts of the case are to the contrary.

The District Court found that "[i]t is undisputed that the sole purpose of the examination was to determine whether sexual abuse had occurred. No claim has been advanced, directly or indirectly, that the examination was related to necessary medical care or treatment of the child following assumption of custody by the Child Welfare Administration." (A101) Indeed, Petitioners themselves acknowledged that they ordered an examination of Sarah Tenenbaum solely for investigative purposes, not for medical purposes. They stated categorically that "[t]he medical examination conducted at the request of CWA was for investigative purposes to determine if Sarah had been sexually abused; it was not conducted to provide her with medical treatment." (Memorandum of Law in Support of Defendants' Motion for Summary Judgment, p. 23, reproduced in Supplemental Appendix to the Second Circuit, p. SA-24)

With regard to the medical examination of Sarah Tenenbaum, as with the removal of Sarah from her parents, Petitioners do not claim that there is a split among the circuits. Rather, Petitioners appear to be claiming that

the Second Circuit decision conflicted with a prior decision of the circuit, *van Emrik v. Chemung County Department of Social Services*, 911 F.2d 863 (2d Cir. 1990). (Petitioners incorrectly assert that *van Emrik* was a decision by "this Court." (P24, P30)) Thus, Petitioners assert that the Second Circuit should have distinguished *van Emrik* instead of adhering to it. (P26, P30)

The alleged failure of a court of appeals to follow its own precedents is not a basis for review by this Court. See, e.g., *Davis v. United States*, 417 U.S. 333, 340 (1974). Moreover, the Second Circuit declined to grant en banc review of the instant action. (A126) In so doing, the Second Circuit implicitly indicated that it did not consider its decision in the instant case to conflict with its prior decision in *van Emrik*.

Petitioners argue, at length, that it was "reasonable" for Nat Williams to remove Sarah Tenenbaum and subject her to an intrusive medical examination. (P21-23) Those claim is not properly before this Court.

In arguing that an individual defendant acted reasonably, the Petitioners are in fact alleging that Williams is entitled to qualified immunity from liability. See, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Williams, who is not a Petitioner in this Court, has already been found by the District Court and the Court of Appeals to have qualified immunity. (A88, A40-41) Because the Court of Appeals found that the law was not clearly established, the Court did not reach the question of whether Williams' actions were objectively reasonable. As Williams is not a

Petitioner here, the reasonableness of his actions is not before this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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